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No.

IN THE

Supreme Court of the United States

October Term, 1982

ALABAMA FURNITURE CO.,

Petitioner,

v.

C. KENNETH STILL, Trustee, and ULYSSES RIVERS, JR.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SIXTH CIRCUIT COURT OF APPEALS

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QUESTIONS PRESENTED

1. Whether, in the absence of curative congressional action and after release of this Court's mandate in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, ____ U.S. ____, 102 S.Ct. 2858 (June 28, 1982), the entire Bankruptcy Reform Act of 1978 is unenforceable and must fall because it can not be administered absent the bankruptcy court jurisdiction held inoperative in *Northern Pipeline*?

2. Whether, until Congress acts further, the invalidation of the Bankruptcy Reform Act of 1978 in its entirety revives the Bankruptcy Act of 1898, as amended, to govern bankruptcy proceedings in this case and in all cases pending or filed after release of the *Northern Pipeline* mandate?

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JURISDICTION

Notice of appeal was docketed in the court of appeals on April 26, 1982. The jurisdiction of this Court is founded on 28 U.S.C. § 1254(1). This petition is filed before judgment by the Court of Appeals pursuant to Rule 18 of this Court, and 28 U.S.C. § 2101(e). Briefing in the Court of Appeals has been stayed pending resolution hereof.

OPINION BELOW

The April 14, 1982 memorandum order of the bankruptcy court is reported at *In re Ulysses Rivers, Jr.*, 8 B.C.D. 1212, 6 CBC 2d 210 (Bk. E.D. Tenn. 1982). The order of April 23, 1982 denying petitioner's motion to proceed under the provisions of the Bankruptcy Act of 1898, as amended, is unreported. They are reproduced in the Appendix hereto.

STATUTE INVOLVED

The Bankruptcy Reform Act of 1978, Pub. L. 95-598, is set forth at 92 Stat. 2549 *et seq.* Selected significant portions for the purposes hereof are reproduced in the Appendix.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1932

ALABAMA FUNITURE CO.,

Petitioner,

v.

C. KENNETH STILL, Trustee, and ULYSSES RIVERS, JR.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SIXTH CIRCUIT COURT OF APPEALS

STATEMENT

This case presents an issue of exceptional public importance and urgency. At issue is whether, in the absence of appropriate curative congressional action, our bankruptcy system, which handles more than half a million cases per year, can continue to function effectively — or at all — after release of this Court's mandate in *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, ____U.S.____, 102 S.Ct. 2858 (June 28, 1982), which invalidated the jurisdiction granted the untenured bankruptcy "courts" established by the Bankruptcy Reform Act of 1978 (the "1978 Act") as the exclusive means for administering all bankruptcies.[1] The 1978 Act was not just an amendatory act, but was a unified recodification of the entire corpus of existing bankruptcy law, dependent upon those unconstitutional bankruptcy courts for

[1] This Court in *Northern Pipeline* held that the untenured bankruptcy courts created by the 1978 Act can not constitutionally exercise the powers and jurisdiction granted them under than Act, at least with respect to state-created claims. This Court also held that the jurisdictional grant to the bankruptcy courts by the 1978 Act was intended to be, and is, inseverable. See footnote 2, *post*. Thus the effect of *Northern Pipeline* is that the grant of jurisdiction to the bankruptcy courts under the 1978 Act is invalid in its entirety.

its administration. Although it made few substantive changes, the 1978 Act was an integrated enactment which cannot be administered apart from its new (and unconstitutional) bankruptcy courts.

Thus, absent Congressional action, upon release of the mandate in *Northern Pipeline* no mechanism will exist to administer the provisions of the 1978 Act; under that Act, the district courts are specifically disempowered from administering bankruptcies, and after *Northern Pipeline* the new bankruptcy courts lack jurisdiction to do so. For the millions of debtors and creditors involved in pending or future bankruptcies, relief under the 1978 Act will therefore become impossible. Lacking an alternative source of relief, debtors and creditors alike will be faced with huge burdens and losses which are immediate, harsh, and incalculable. Companies unable to reorganize will fire workers rather than continue their unprofitable employment. Economic chaos on a vast scale will ensue. Legal confusion will multiply existing burdens on the already over-taxed lower courts.

Petitioners contend that an alternative to this disruption and loss does exist, and that it may be implemented in this case. The bankruptcy system can continue to function, in the absence of Congressional action and after release of this Court's mandate in *Northern Pipeline*, because the fall of the 1978 Act in its entirety permits revival of the (then) ineffectively repealed prior Bankruptcy Act of 1898, as amended. The present "bankruptcy judges," previously appointed as referees under the prior Act, then become empowered to administer bankruptcies under the terms of the prior Act. Further congressional action is unnecessary to avoid loss and disruption and to permit the effective administration of bankruptcies, and release of this Court's mandate in *Northern Pipeline* can occur without harmful effect to the public.

The public interest requires that this Court address this question immediately. If not resolved now, this problem will confound the administration of each and every bankruptcy petition filed or still pending after release of the *Northern Pipeline* mandate. If not resolved now, the purpose and effect of the bankruptcy laws — to preserve by prompt action values and assets for creditors while providing debtors relief from otherwise costly and debilitating suits — will be destroyed. If not resolved now, these costs will begin immediately, and they will be irremediable. But it is unnecessary to so abandon this nation's creditors and debtors.

Petitioners believe the present case presents an appropriate means — perhaps the only appropriate means — for the prompt and effective resolution of these urgent and unavoidable issues. The fact the *Northern Pipeline* judgment was prospective and the mandate stayed does not diminish, but sharpens, the timeliness and ripeness hereof.

Proceedings Below

These proceedings were initiated in the "Bankruptcy Court" for the Eastern District of Tennessee in April, 1981 by the debtor, Ulysses Rivers, Jr., who filed a Petition and Plan under Chapter 13 of the Bankruptcy Reform Act of 1978 (the "1978 Act"). Alabama Furniture has a purchase money security interest in various household goods purchased from it by Rivers. The debtor's plan, designed under the 1978 Act, proposes to extinguish outright almost half of Alabama Furniture's secured claim and to defer payments on the remainder over a period of years.

Upon Alabama Furniture's motion, the "Bankruptcy Court" on April 14, 1982 held that the "bankruptcy courts" created by the Act are unconstitutional in violation of Article III of the U.S. Constitution. Alabama Furniture further argued that this result causes the revival of the 1898 Bankruptcy Act, as amended, and that the bankruptcy judge (referee) continues to have power to

adjudicate this case but only pursuant to the provisions of that Act. The bankruptcy court held to the contrary, however, and ordered that the entire case be dismissed. Alabama Furniture Co.'s motion to modify the order of dismissal to permit the case to proceed under Chapter XIII of the Bankruptcy Act of 1898, as amended, was denied. Under 28 U.S.C. § 1293(b), notices of appeal were filed directly with the Court of Appeals for the Sixth Circuit by Alabama Furniture from the order of dismissal and the order denying modification of the stay and by the trustee from the order of dismissal. The appeals are presently consolidated on the docket of that Court, which has deferred briefing pending resolution of this petition.

Thus the issue squarely presented is the effective law on remand after release of the stay of mandate in *Northern Pipeline*.

REASONS FOR GRANTING THE WRIT

1. The public interest in a functional bankruptcy system requires immediate resolution of the issues presented in this case.

Certiorari should be granted here in order to resolve the crucial question — of enormous practical importance to millions of Americans, debtor and creditor alike — of whether or how our bankruptcy system will function in the absence of congressional action to repair the major constitutional deficiencies in the 1978 Act exposed by this Court in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, ____U.S.____, 102 S.Ct. 2858 (1982) (mandate stayed until December 24, 1982). The present case presents the question whether, after release of the *Northern Pipeline* mandate and without action by Congress, this case should be attempted to be administered under the provisions of the 1978 Act, should be dismissed entirely, or should be administered under the prior Bankruptcy Act of 1898, as amended. It thus affords a unique opportunity to avoid widespread impending

harms and to indicate which, if any, procedures apply for the disposition of bankruptcy cases after December 24, 1982 (or any further stay date), whether or not this Court agrees with petitioner's ultimate position herein.

On June 28, 1982, this Court decided in *Northern Pipeline* that the untenured judiciary created by Congress in order to staff the powerful new bankruptcy "courts" could not constitutionally exercise the jurisdiction and powers given them with respect to state-created claims because such exercise would violate the constraints imposed by Article III of the Constitution. Furthermore, this Court recognized that the congressional scheme embodied in the 1978 Act, with its insistence on a single, unitary court for the resolution of all bankruptcy and "related" matters, is completely inconsistent with a piecemeal approach to bankruptcy jurisdiction, and consequently this Court held that the grant of jurisdiction vested in the bankruptcy "courts" by the 1978 Act is inseverable, and thus invalid in its entirety under the 1978 enactment.[2] Thus upon release of the stay of mandate in *Northern*

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[2] Justice Brennan, writing for the *Northern Pipeline* plurality of four, stated that:

> It is clear that, at the least, the new bankruptcy judges cannot constitutionally be vested with jurisdiction to decide this state-law contract claim against Marathon. As part of a comprehensive restructuring of the bankruptcy laws, Congress has vested jurisdiction over this and all matters related to cases under title 11 in a single non-Art. III court, and has done so pursuant to a single statutory grant of jurisdiction. In these circumstances we cannot conclude that if Congress were aware that the grant of jurisdiction could not constitutionally encompass this and similar claims, it would simply remove the jurisdiction of the bankruptcy court over these matters, leaving the jurisdictional provision and adjudicatory structure intact with respect to other types of claims, and thus subject to Art. III constitutional challenge on a claim-by-claim basis. Indeed, we note that one of the express purposes of the Act was to ensure adjudication of all claims in a single forum and to avoid the delay and expense of jurisdictional disputes See H.R. Rep. No. 95-595, *supra*, p. 43-48; S. Rep. No. 95-989, p. 17 (1978). Nor can we assume, as THE CHIEF JUSTICE suggests, *post*, at 2, that
>
> (footnote continues)

Pipeline, and absent curative action by Congress, the bankruptcy courts — through which the 1978 Act was structured to be exclusively administered — will lack any jurisdiction whatsoever and can not function.

Because a retroactive application of the holding would have visited substantial hardship upon litigants who had relied upon the Act, the decision was given prospective effect only.[3] Moreover, the judgment was stayed until October 4, 1982 (and that stay subsequently extended until December 24, 1982) in order to facilitate the administration of the bankruptcy laws while Congress had the opportunity to devise a constitutional court system. The issue presented in this case, and not resolved in *Northern Pipeline*, is whether, upon expiration of the stay of mandate, the 1978 Act, absent the provisions by which it was intended and designed to be exclusively administered, can be so administered. The alternatives are twofold; first, that all bankruptcies cease, or second, as Alabama Furniture contends, that the prior Act revives to allow the administration of bankruptcies to continue. In any event,

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> Congress' choice would be to have this case "routed to the United States district court of which the bankruptcy court is an adjunct." We thank that it is for Congress to determine the proper manner of restructuring the Bankruptcy Act of 1978 to conform to the requirements of Art. III, in the way that will best effectuate the legislative purpose.

102 S.Ct. at 2880, n. 40.

Justice Rehnquist, in an opinion in which Justice O'Connor concurred, indicated that

> Because I agree with the plurality that this grant of authority is not readily severable from the remaining grant of authority to Bankruptcy Courts under § 241(a), see *ante*, at 37 n. 40, I concur in the Judgment.

102 S.Ct. at 2882.

[3] The prospective application of *Northern Pipeline* does not deprive the petitioners of relief in these proceedings, because the question here is the applicable law on remand after release of the mandate in *Northern Pipeline*.

absent prompt resolution of this issue by this Court, the effect on the public and on debtors, creditors and the country's court systems will be extreme.

Consequently, in the absence of appropriate curative legislation, it is of the greatest public importance that this Court address this problem immediately.

2. Because the 1978 Bankruptcy Act is an integrated enactment and cannot be administered apart from its unconstitutional court provisions, the 1978 Act as a whole falls and the prior Bankruptcy Act revives to govern bankruptcies until further action by Congress.

Petitioner respectfully submits that the 1978 Act was set up to be exclusively administered by its unconstitutional bankruptcy court system, and that it was intended *not* to be administered and can *not* properly be administered by the district courts of the United States. Until Congress can enact a new and constitutional bankruptcy law, the prior bankruptcy law revives, because repeal of a prior law is ineffective if the repeal is part of a substitute enactment which is itself ineffective. The Bankruptcy Act of 1898 (as amended), was in fact continued in effect by the 1978 Act for all then pending cases — at last count almost one-fifth of all present pending bankruptcy cases. Revival of the prior Act for the remaining cases allows the continued functioning of the bankruptcy system by the existing cadre of referees (judges) under a set of known and broadly similar rules and provisions, without endless litigation and consequent harmful delays in bankruptcy administration, and without burdening the district court judges. Revival can be prospective only, so parties in pending cases who relied upon existing law will not be injured and decided matters remain as decided.

The Bankruptcy Reform Act of 1978 was designed and structured to be an integrated enactment with the new bankruptcy "courts" its indispensible centerpiece. As Congressman Rodino, chairman of the House Judiciary Committee responsible for

reporting out the bill, stated, "the most significant portion of the bill concerns the way bankruptcy cases are handled." 123 Cong. Rec. H 11,697. Congressman Edwards, chairman of the Subcommittee on Civil and Constitutional Rights and prime author of the bill, remarked that "the new court system . . . is at the heart of the bill." *Id.* at H 11,699. Congressman Butler, the ranking minority member of the subcommittee, stated that: "This bill serves no purpose whatsoever if the independence of the bankruptcy courts is removed." *Id.* at H 11,703.

This history, considered together with the absence of any severability clause, suggests that Congress intended the 1978 Act as a whole to stand or fall with its court provisions. Examination of the structure and interrelationships of the 1978 Act makes this conclusion clear. It is of course settled that the practical difficulty of applying remaining portions of partially invalid statutes indicates that the entire act should fall. *United States v. Jackson*, 390 U.S. 570, 585, 88 S.Ct. 1209 (1968); *compare Electric Bond & Share Co. v. Securities & Exchange Commission*, 303 U.S. 419, 434-35, 58 S.Ct. 678 (1938).

After release of the *Northern Pipeline* mandate, and in the absence of congressional action, the only constitutional courts available to administer the 1978 Act are the United States district courts. But examination of the 1978 Act reveals that there are numerous obstacles to any judicial attempt to transfer bankruptcy administration under the provisions of the 1978 Act to the district courts. For example, the 1978 Act grants *exclusive* jurisdiction over all property of the debtor, "wherever located," to the bankruptcy courts alone. 28 U.S.C. § 1471(e). This provision carried out Congress' intention that the district courts not administer bankruptcies under the 1978 Act. See 1 *Collier on Bankruptcy*, ¶3.01 (15th ed. 1980). Consequently, absent an "artful" construction of the statute, the district courts would be powerless to acquire jurisdiction over the property of the estate. Acquisition

of such power is a *sine qua non* of effective bankruptcy administration; without it the court cannot protect the debtor's property from creditors.

At the most mechanical level, moreover, the 1978 Act requires that a bankruptcy case be initiated by the filing of an appropriate petition "with the bankruptcy court." 11 U.S.C. §§ 301-304. This filing defines the estate to be administered and triggers the automatic stay. 11 U.S.C §§ 362-363. In the face of Congress' repeatedly expressed intent in the 1978 Act to remove bankruptcy under that Act from the domain of the district courts, it is difficult to see how these sections could be construed to permit filings with the district court.

Nor could the district courts avoid the crushing burden of the over half million bankruptcy cases, in addition to their present record dockets, by employing the current corps of bankruptcy "judges" to administer bankruptcy cases under the 1978 Act. Unless the 1978 Act falls and the prior Act revives, these referees or "judges" lack power to act. The 1978 Act repealed their prior powers along with the rest of the prior Act, except as to proceedings commenced prior to October 1, 1979. Pub. L. No 95-598, Title IV (Transition) §§ 401, 403(a), 404(d). And of course exercise of their powers and jurisdiction under the 1978 Act was precisely what was held unconstitutional or otherwise invalid in *Northern Pipeline*. Neither can the existing referees or "judges" be effectively designated as magistrates or masters under existing provisions, since the qualifications and powers of these are too limited to bridge the gap. *See* Fed.R.Civ.P. 53; 28 U.S.C. §§ 631-37.

It is not the job of the federal judiciary to patch and reconstruct Congressional legislation such as the 1978 Act. Indeed, such efforts would endanger the fundamental separation of powers. *Cf. Buckley v. Valeo,* 424 U.S. 1, 120-23, 96 S.Ct. 612

(1976). Nor is it appropriate to enforce only part of an integrated statute such as the 1978 Act when the result "would be to create a program quite different from the one the legislature actually adopted." *Sloan v. Lemon,* 413 U.S. 825, 834, 93 S.Ct. 2982 (1973) (rejecting partial enforcement of a Pennsylvania tuition reimbursement statute, despite the presence of a severability clause).

While the Bankruptcy Reform Act of 1978 must fall because it is a unitary scheme that cannot be administered (and was not intended to be administered) apart from its judicial provisions, this result does not deprive our country of a national bankruptcy law. A basic rule of statutory construction provides that the prior law, the Bankruptcy Act of 1898, as amended, ineffectively repealed and supplanted by the 1978 Act, will revive to fill the vacuum until Congress is able to agree upon a new and constitutional bankruptcy law. *Frost v. Corporation Comm'n,* 278 U.S. 515, 526, 49 S.Ct. 235 (1929); *Wessinger v. Boswell,* 330 F.Supp. 615 (M.D. Ala. 1971); *State v. Rondeau,* 89 N.M. 408, 553 P.2d 688 (1976); *Fiorito v. Jones,* 39 Ill.2d 531, 236 N.E.2d 698 (1968); 1A Sutherland, *Statutes and Statutory Construction* § 23.24 (4th ed. 1972). As stated in *State v. Rondeau, supra,* in which the New Mexico Supreme Court held that the unconstitutionality of a death penalty statute revived its repealed predecessor, "During the interim between the declaration of the statute's unconstitutionality and a new enactment by the Legislature which meets constitutional standards, the former statute is revived and becomes effective without any formal act by the Legislature, absent a contrary legislative intent." 553 P.2d at 692-93.

Consequently, this case on remand, and all future cases, should be governed by the Bankruptcy Act of 1898, as amended, until further direction from Congress.

Revival of the prior Act will allow a continuity of administration for all bankruptcy cases by the existing cadre of referees under rules and procedures broadly similar to those of the 1978 Act.

The result will be a bankruptcy system that can function smoothly until Congress prepares, and agrees upon, new legislation. The alternative is unnecessary and widespread economic chaos and dislocation.

CONCLUSION

For the foregoing reasons, the Petition should be granted.

Respectfully submitted,

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In re ULYSSES RIVERS, JR.,
Debtor

No. 1-81-00682
Chapter 13

E.D. Tennessee
April 14, 1982

RALPH H. KELLEY, Bankruptcy Judge

MEMORANDUM

[2] The debtor, Ulysses Rivers, Jr., filed a petition and plan under Chapter 13 of the Bankruptcy Code. A creditor, Alabama Furniture Company, filed a motion to dismiss the case.

The motion avers that the court cannot constitutionally exercise jurisdiction in a bankruptcy case because the bankruptcy judge does not have the tenure and salary protections afforded to federal judges by Article III, § 1 of the United States Constitution.

The creditor filed a proof of claim for § 782.23. The claim was secured by a perfected, unavoidable, purchase money security interest in household goods. In his Chapter 13 plan, the debtor proposed to treat § 350.00 of the claim as secured and pay that part in full, but over a longer period of time than allowed by the contract with the creditor. *See* 11 U.S.C. §§ 506 and 1325(a)(5). The plan proposed to pay 50% on the remainder, § 432.23, as a general unsecured claim. *See* 11 U.S.C. § 1325(a)(5). The court confirmed the plan specifically without prejudice to creditor's motion to dismiss.

Article III, § 1 of the United States Constitution provides:

> The judicial power of the United States shall be vested in one Supreme Court, and in such inferior

> courts as the Congress may from time to time ordain and establish. The judges, [3] both of the Supreme Court and the inferior courts, shall hold their offices during good behavior, and shall, at stated times receive for their services, a compensation, which shall not be diminished during their continuance in office.

Tenure during good behavior and a protected salary will hereafter be referred to as "constitutional tenure."

Bankruptcy judges serve for a term of years, rather than during good behavior. Presently, the term is until 1984. Bankruptcy Reform Act § 404(b) and (d).[1] In 1984, the term will be increased to fourteen years. Bankruptcy Reform Act § 201 (28 U.S.C. § 152) and § 402(b), (c), and (d). A bankruptcy judge may be removed from office for reasons other than breach of the constitutional standard of good behaviour. Bankruptcy Reform Act § 404(d); Bankruptcy Act § 34, 11 U.S.C. § 62 (1976). By statute a bankruptcy judge's salary can be reduced during his term but not below what it was at the beginning. Bankruptcy Reform Act § 404(d); Bankruptcy Act § 40a and b, 11 U.S.C. § 68 (1976). Without the constitutional protection, a change in the statutes can reduce the slight protection they give.

The legislative history of the Bankruptcy Reform Act shows that the major compromise between the Senate and [4] the House of Representatives was deletion from the final bill of any provisions that would make the bankruptcy courts Article III courts or give the bankruptcy judges constitutional tenure. *See* the following articles in the 1979 Annual Survey of Bankruptcy Law: Klee, Legislative History of the Bankruptcy Reform Act of

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[1] Bankruptcy Reform Act of 1978, Pub.L.No. 95-598, 92 Stat. 2549 (1978). The cited provisions leave it unclear whether a judge first appointed during the transition is appointed for six years or until the end of the transition period on March 31, 1984.

1978, reprinted from 28 DePaul L. Rev. — (1979); Feidler & Dixon, Reflections of the Legislative History of the Bankruptcy Reform Act of 1978; Wallop, Footnotes to the Bankruptcy Reform Act of 1978; Clarkson, A Brief Overview of the Congressional Debate on the Bankruptcy Court System. *See* also 1 Collier on Bankruptcy para. 2.01[c], (15th ed. 1981).

It is clear that bankruptcy judges do not have constitutional tenure. The question is whether the Constitution requires that they have it. Before considering the arguments in detail, the court must answer a preliminary question.

(1)

The creditor has standing to raise the constitutional issue. The provisions of Article III, § 1 were meant to preserve the idependence of federal judges not for their own benefit but for the benefit of litigants in the federal courts. In *Glidden v. Zdanok* the petitioners contended that they were denied the right to independent judges because [5] judges of the Court of Claims and the Court of Customs and Patent Appeals, sitting by designation, participated in their cases in the federal district court and the circuit court of appeals. 370 U.S. 530, 82 S.Ct. 1459, 8 L.Ed.2d 671 (1962). In an opinion joined in by three justices, the court held that the petitioners could raise the issue.

> No contention is made that either [judge] displayed a lack of appropriate judicial independence, or that either sought by his rulings to curry favor with Congress or the Executive. Both indeed enjoy statutory assurance of tenure and compensation, and were it not for the explicit provisions of Article III we should be quite unable to say that either judge's participation even colorably denied the petitioners independent judicial hearings.

> Article III, § 1, however, is explicit and gives petitioners a basis for complaint without requiring them to point to particular instances of mistreatment in the record...

82 S.Ct. at 1464. *Cf. Palmore v. United States*, 411 U.S. 389, 93 S.Ct. 1670, 36 L.Ed.2d 342 (1973); *Crowell v. Benson*, 285 U.S. 22, 52 S.Ct. 285, 76 L.Ed. 598 (1931).

It cannot rightfully be said that the creditor was not a litigant. Its contract rights were affected by the Chapter 13 case at least as much as they could have been affected in a suit involving the creditor and the debtor as plaintiff and defendant. Furthermore, the question was not lost as a result of confirmation of the Chapter 13 plan. Confirmation [6] did not require and was not obtained by creditor's consent. The creditor may argue after confirmation that it was denied the constitutional protection of an independent judge.

The importance of the independent judiciary requirement supported the Supreme Court's invocation of the Rule of Necessity in *United States v. Will*, 449 U.S. 200, 101 S.Ct. 471, 66 L.Ed.2d 393 (1980). In that case, federal district judges challenged the application to them of a statute that would deny compensation to which they arguably had become entitled. The statute also applied to the justices of the Supreme Court. The Supreme Court held that the Rule of Necessity required them to decide even though another statute would disqualify them because of their personal interest in the outcome. Writing for himself and the seven other justices who took part, Chief Justice Burger said:

> As this court has observed elsewhere, the Compensation Clause is designed to benefit, not the judges as individuals, but the public interest in a competent and independent judiciary. *Evans v. Gore*, 253 U.S. 245, 253, 40 S.Ct. 550, 553, 64 L.Ed. 887 (1920). The public might be denied resolution of this crucial

> matter if first the District Judge, and now all the Justices of this Court, were to ignore the mandate of the Rule of Necessity and decline to answer the question presented.

101 S.Ct. at 481-482.

It must be said that the independent judiciary provisions are more than a due process protection of the [7] rights of litigants. As the court will explain later, an independent judiciary is a crucial element in the constitutional structure of the federal government. The structure of the federal government as required by specific constitutional provisions implementing "separation of powers" is the first line of defense of rights secured by the Constitution. This is essentially the point made in *Glidden v. Zdanok*; quoted above.

The writings of the philosopher Montesquieu were familiar to some of the drafters of the Constitution. Montesquieu conceded that "constitutional liberty," by which he meant a government structured to secure individual liberty, would not necessarily secure it.[2] Nevertheless, the drafters of the Constitution intended to create a federal government whose structure would be effective toward securing the political rights of the people.[3] To that end, federal courts are bound by self-interest to decide cases in which the question is whether a tribunal created by Congress is established contrary to particular constitutional limits respecting the structure of the federal government; at [8] least, the courts are

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[2] C. Montesquieu, The Spirit of Laws, Book XI & Book XII, Part 1, reprinted in Vol. 38, Great Books of the Western World (1952).

[3] The drafters' method is revealed in the final paragraph of the quotation from The Federalist No. 51, below at p. 11. Montesquieu made essentially the same point in Part 4 of Book XI of The Spirit of Laws: "To prevent this abuse [of power], it is necessary...that power should be a check to power."

bound to decide in cases where there are satisfactory criteria for judicial application of the constitutional limits.[4] As will be evident, there are satisfactory criteria for decision in this case.

The creditor should not be denied the right to raise this important issue because it has shown no particular harm resulting to it from the fact that the judge who decided the issues lacked constitutional tenure. Such a requirement of proof would write the tenure provisions out of the Constitution as a protection of the rights of litigants. It is important to all citizens that the federal government be structured as required by the Constitution, but it is particularly important to persons compelled to participate in federal court proceedings that the court be established in accordance with specific constitutional provisions intended to secure protection of their rights.

(2)

The creditor's motion was opposed by C. Kenneth Still, the Chapter 13 trustee; and by Southeast Tennessee Legal Services, which was allowed to participate as amicus curiae. The Attorney General of the United States declined to intervene.

[9]There are basically two arguments made in opposition to creditor's motion. The first argument is that bankruptcy cases need not be heard by an Article III court. The trustee's argument on this point is divided generally according to the several points it includes but often in the confusing terms of "the judicial power." Amicus took a different approach. Amicus argued that Congress has the power to commit bankruptcy matters to a non-Article III court.

The trustee made another argument — that the bankruptcy court is not independent of the Article III judicial system. The thrust of this argument is that even if a judge with constitutional

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[4] *See* Wright, Law of Federal Courts § 14 (3d ed. 1976) (discussion of the "political question" limit on justiciability).

tenure is required, the requirement is met by the right to appeal to an Article III court or by the federal district court's control of bankruptcy cases. This argument is not relevant unless it is decided that constitutional tenure is required. The court will therefore consider the main question first. Does the Constitution require that the bankruptcy judges have constitutional tenure?

(3)

Despite Article III, § 1, Congress can establish courts whose judges do not have constitutional tenure. The [10] tenure provisions of Article III, § 1 are not an invariable mandate to Congress, but must be a limit on its power to create courts. Otherwise, they are meaningless. When is Congress constitutionally justified in disregarding the constraints of Article III?

In searching for a rationale, the court must follow fundamental ideas of constitutional interpretation. The Constitution establishes only a basic framework for the operation of the federal government. This makes every provision important but calls for restraint in interpretation. It must be remembered that the Constitution was meant to establish a workable system of government. Its provisions must be read in light of the purposes they were meant to serve in the overall constitutional plan of government.

The constitutional tenure provisions can be understood only in light of the Constitution's implementation of "separation of powers." With regard to constitutional separation of powers, two points are important.

The Constitution does not specifically provide for separation of powers. It creates a federal government composed of three branches — legislative, executive, and judicial — and gives each powers to perform its functions. The Constitution also contains specific provisions meant to give each branch the independence and ability to restrain the others to their proper functions. Thus,

constitutional [11] separation of powers can be given effect only by interpretation of the specific provisions meant to implement separation of powers.

The second point is related. Compulsion of the people or the states is the ultimate object of federal power. In this sense, the federal power is indivisible. Separation of powers controls the complete exercise of federal power by requiring the cooperation of more than one of the three not always cooperative groups of people who form the three branches. In other words, separation of powers is concerned primarily with *who* performs what function.

In Number 47 of The Federalist, James Madison reviewed Montesquieu's reasons for separation of powers:

> "When the legislative and executive powers are united in the same person or body," says he, "there can be no liberty because apprehensions may arise lest *the same* monarch or senate should *enact* tyrannical laws to *execute* them in a tyrannical manner." Again: "Were the power of judging joined to the legislative, the life and liberty of the subject would be exposed to arbitrary control, for the *judge* would then be the *legislator*. Were it joined to the executive power, *the judge* might behave with all the violence of *an opressor*."

In Number 48, Madison explained that separation of powers did not mean complete separation of powers.

> [12] I shall undertake, in the next place, to show that unless these departments be so far connected and blended as to give each a constitutional control over the others, the degree of separation which the maxim requires, as essential to a free government, can never in practice be duly maintained.

This is consistent with the common understanding that the Constitution was intended to give each branch power to check the other branches' exercise of power. The tenure provisions can be understood in this light as an element of separation of powers.

Madison's comments in Number 51 of The Federalist show that the tenure provisions of Article III are an element of separation of powers.

> In order to lay a due foundation for that separate and distinct exercise of the different powers of government... it is evident that each department should have a will of its own; and consequently should be so constituted that the members of each should have as little agency as possible in the appointment of the members of the others...
>
> It is equally evident that the members of each department should be as little dependent as possible on those of the others for the emoluments annexed to their offices. Were the executive magistrate, or the judges, not independent of the legislature in this particular, their independence in every other would be merely nominal.
>
> But the great security against a gradual concentration of the several powers in the same department consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others... Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place.

[13] More specific reasons for the tenure provisions were given by Alexander Hamilton in The Federalist Number 78. He considered tenure during good behavior necessary to give the judiciary the independence needed —

(1) to declare unconstitutional and unenforceable laws passed by Congress but contrary to specific constitutional limits on Congress' lawmaking authority;

(2) to protect individuals from unconstitutional deprivations of their rights and dangerous, unconstitutional innovations in government, even though brought about by or reflecting the will of the majority of citizens;

(3) to restrict the application of and thereby discourage passage of laws that are unjust to particular classes of citizens;

(4) to attract competent people to the federal bench.

Of these concerns, all but the fourth are relevant to the question at hand. It is wholly a legislative consideration.

Hamilton justified the absence of a provision on removal of judges for inability because it would be too difficult to apply and so vague it "would much oftener give scope to personal and party attachments and enmities than advance the interests of justice and the public good." The Federalist No. 79.

In Number 79, Hamilton did not add any other [14] reasons for judicial independence but did reiterate the point that the judges' salaries should be protected because "[i]n the general course of human nature, *a power over a man's subsistence amounts to a power over his will.*"

The decisions of the Supreme Court follow an understandable pattern with regard to the purpose of the tenure provisions in preserving separation of powers. But the decisions can be understood only in light of the related concept of "federalism." It concerns the relationship between the federal government and the states.

The Constitution does more than divide the power of the union among the three branches of the federal government. It first

divides general sovereign power over the people between the states and the federal government. The Constitution was meant to limit the federal government's sovereign power to that necessary for national functions. General, indefinite sovereign power was reserved to the states or the people.

In Number 39 of The Federalist, James Madison explained:

> The difference between a federal and national government, as it relates to the operation of the government, is by the adversaries of the plan of the convention supposed to consist in this, that in the former the powers operate on the political bodies composing the Confederacy in their political capacities; in the latter, on [15] the individual citizens composing the nation in their individual capacities. On trying the Constitution by this criterion, it falls under the *national* not the *federal* character; though perhaps not so completely as has been understood...
>
> But if the government be national with regard to the *operation* of its powers, it changes again when we contemplate it in relation to the extent of its powers. The idea of a national government involves in it not only an authority over the individual citizens, but an indefinite supremacy over all persons and things, so far as they are objects of lawful government... In this relation, then, the proposed government cannot be deemed a *national* one; since its jurisdiction extends to certain enumerated objects only, and leaves to the several States a residuary and inviolable sovereignty over all other objects...

In Number 9, Alexander Hamilton remarked that the constitutional scheme of distribution of powers between the states and the United States government comports with the idea of federal government.

> The proposed Constitution, so far from implying an abolition of the State governments, makes them constituent parts of the national sovereignty, by allowing them a direct representation in the Senate, and leaves in their possession certain exclusive and very important portions of sovereign power. This fully corresponds, in every rational import of the terms, with the idea of a federal government.

The Tenth Amendment, adopted soon after the Constitution, also reflects the idea of federalism.

> [16] The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.

In Article III, federalism is reflected primarily in § 2, cl.1, the "judicial power" clause.

> The judicial power shall extend to all cases, in law and equity, arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; — to all cases affecting ambassadors, other public ministers and consuls; — to all cases of admiralty and maritime jurisdiction; — to controversies to which the United States shall be a party; — to controversies between two or more states; — between a state and citizens of the same state claiming lands under grants of different states, and between a state or citizens thereof, and foreign states, citizens or subjects.

This provision limits application of the judicial power by describing the kinds of cases or controversies to which it applies. Cases or controversies omitted from the description are not subject to the judicial power. The most notable omission clearly reveals the

federalism basis of the description: cases between citizens of the same state and not involving the Constitution or any federal law or treaty are not subject to the judicial power.

On the other hand, the terms "case" or "controversy" have been interpreted as a separation of powers limitation. The Article III courts perform only the traditional [17] functions of courts, primarily deciding cases or controversies. Congress cannot impose other duties on the Article III courts.

Generally, the federalism concerns behind constitutional tenure are also reflected in The Federalist No. 78. The Article III courts have a political place in our system of government. With respect to specific constitutional limitations on state and federal power, the Article III courts mediate between the other branches of the federal government and the people, between the federal government and the states, and between the states and the people. That this function is performed by deciding specific cases and controversies does not mean it is not a "political" function in the general sense. For our purposes, the important point is that when a court is in the position to decide such questions, the federalism policies behind constitutional tenure apply.

As to the specific federalism limits on the judicial power, this is a situation where the Constitution connects "[t]he interests of the man . . . with the constitutional rights of the place." The Federalist No. 51 (Madison). The independence of Article III judges is meant to be felt by them as a personal virtue that is threatened by congressional attempts to require them to perform duties not traditionally performed by courts or to decide cases not [18] described in Article III, even though the reach of their individual power would be increased.

(4)

Before considering the bankruptcy courts in light of the policies behind constitutional tenure, the court must clarify the issue.

It is established that most of the jurisdiction exercised by the bankruptcy courts is jurisdiction that could be exercised by Article III courts. There is some question as to whether it includes cases or controversies not of a kind described in Article III. § 2, cl. 1. *See generally,* Note: Bankruptcy and the Limits of Federal Jurisdiction, 95 Harv. L. Rev. 703 (1982). That is not a problem in this case. In this case, the question is whether the bankruptcy jurisdiction that can be exercised by Article III courts can also be exercised by non-Article III courts. The court is concerned with constitutional justifications for giving non-Article III courts or other tribunals, including administrative agencies, the power to decide disputes that definitely are cases or controversies justiciable in Article III courts.

Congress is not required to create "inferior federal courts" as contemplated in Article III. § 1. Congress can and often has let the state courts decide cases [19] and controversies of the kinds described in Article III. It has been argued that such cases can therefore be decided by non-Article III federal courts.

The argument overlooks the point that the standards of Article III are basic elements in the structure of the federal government. They constrain the methods by which the federal government can exercise "the judicial power." Whenever Congress creates a federal tribunal, the question necessarily arises whether it must meet the standards of Article III. They are a limit on Congress' power to create *federal* courts.

The separation of powers and federalism concerns behind Article III are not a problem with allowing state courts to decide cases that could be decided in Article III courts. As to separation of powers, the tenure and salary of state judges are free of direct control by Congress or the President. As to federalism concerns, they apply when Congress creates a federal tribunal as a mediator

of federal and state power. Though federalism concerns may lead Congress to create lower Article III courts, the Constitution does not demand it.

The argument based on the use of the state courts is essentially a part of the argument that constitutional tenure is a due process right and is therefore required only when necessary for a fair trial. *Cf. Crowell v. Benson*, 285 U.S. 22, 86-87, 52 S.Ct. 285, 306-307, 76 L.Ed. 598 (1931) [20] (J. Brandeis dissenting): *Den (Murray's Lessee) v. Hoboken Land & Improvement Company*, 59 U.S. 272, 15 L.Ed. 372 (1856). That a case can be left for decision before a state court judge who lacks constitutional tenure suggests that due process does not require constitutional tenure for a fair trial. That may be true, but it overlooks the fact that Article III tenure is an element in the constitutional structure of the federal government. In that sense, it may be a right of litigants in a federal forum even if it is not necessary for a fair trial.

The court comes now to consideration of the bankruptcy courts in light of the separation of powers and federalism concerns behind constitutional tenure.

(5a)

Whether these concerns indicate that the judges of a particular tribunal should have constitutional tenure depends on the kind of cases they decide or preside over. It is less evident, but the extent of the tribunal's power is also relevant.

The point that is easiest to overlook is the beginning point. With regard to the subject at hand, exactly how does the Constitution distribute sovereign power between the states and the federal government and federal power among the branches of the federal government?

[21] To a great extent, the decisions of the Supreme Court can be explained on the ground that an Article III court with limited jurisdiction and constitutionally independent judges was not required under the Constitution's specific distribution of powers.

The first examples are courts in the territories and the District of Columbia. In the territories and the District of Columbia, there are no sovereign state governments between the people and the federal government. The concerns of federalism do not demand that the territorial courts or the local courts of the District meet the standards of Article III. Furthermore, the Constitution says that Congress shall provide for the government of the territories and govern the District of Columbia, Art. IV, § 3,cl.2;[5] Art. I, § 8,cl.17.[6] These provisions recognize the necessity of differences in the form of the federal government in the territories and the District of Columbia. They are the basis for saying that the local courts of each need not be subject to the separation of powers requirements of Article [22]III, particularly the case or controversy limitation and the constitutional tenure provisions. *See Palmore v. United States,* 411 U.S. 389, 93 S.Ct. 1670, 36 L.Ed.2d342 (1973): *O'Donoghue v. United States,* 289 U.S. 516.53 S.Ct. 740, 77 L.Ed. 1356 (1932); *American Insurance Co. v. Canter,* 26 U.S. 518, 7 L.Ed. 248 (1828).

The non-Article III military courts provide another example, though for a particular subject matter rather than geographic

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[5] "The congress shall have the power to dispose of and make all needful rules and regulations respecting the territories or other property belonging to the United States..."

[6] "The congress shall have the power...[t]o exercise exclusive legislation in all cases whatsoever, over such district...as may...become the seat of government of the United States..."

[7] "The congress shall have the power...[t]o make rules for the government and regulation of the land and naval forces."

areas. The Constitution gives Congress the power to provide for the government of the military forces. Art. I, § 8, cl. 14;[7] *see also* Art. I. § 8, cl. 15.[8]

This has been interpreted to mean that Congress can create non-Article III military courts but with limited jurisdiction. Generally, their jurisdiction is limited to members of the military and to offenses that interfere with the internal discipline necessary to maintain the military as an effective fighting force. *O'Callahan v. Parker*, 395 U.S. 258, 89 S.Ct. 1683, 23 L.Ed.2d 291 (1969); *Kinsella v. United States*, 361 U.S. 234, 80 S.Ct. 297, 4 L.Ed.2d 268 (1960); *McElroy v. United States*, 361 U.S. 281, 80 S.Ct. [23]305, 4L.Ed.2d 282 (1960); *Grisham v. Hagan*, 361 U.S. 278, 80 S.Ct. 310, 4L.Ed.2d 279 (1960); *Reid v. Covert*, 354 U.S. 1, 77 S.Ct. 1222, 1 L.Ed.2d 1148 (1957); *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 76 S.Ct. 1, 100 L.Ed. 8 (1955).

These limitations were imposed in cases involving criminal offenses on the ground that defendants generally should be entitled to all the protections of the Bill of Rights and Article III, some of which are not afforded the defendants in the military courts.

The first question is whether there is any similar provision in the Constitution with respect to bankruptcies.

The court begins with the premise that if a federal court is to be created to decide cases or controversies subject to the judicial power, Article III is the constitutional norm.[9] Congress' Article I

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[8] Subject to some limitations, this clause gives Congress the power to provide for governing such part of the state militia as may be employed in the service of the United States.

[9] See L. Finley, Article III Limits on Article I Courts: The Constitutionality of the Bankruptcy Court and the 1979 Magistrate Act, 80 Colum.L.Rev. 561, 581-82 (1980); T. Krattenmaker, Article III and Judicial Independence: Why the New Bankruptcy Courts are Unconstitutional. 70 Geo. L.J. 297, 301-303 (1982).

power to pass a statute is the commonest source of federal power over a particular subject matter, but the constitutional structure of the federal government is the constrictive channel through which that power usually must flow.

[24] Congress' legislative powers with regard to the territories, the District of Columbia, and the military, are powers to provide for their government. The constitutional provisions recognize obvious and necessary variations in the structure of the federal government with respect to how federal power can be exercised in the territories, the District of Columbia and the military.

The Constitution gives Congress the power "[t]o establish... uniform laws on the subject of bankruptcies throughout the United States." Art. I, § 8, cl. 4. This does not recognize any exception to the normal structure of the federal government.

The clause does limited the power of the states to legislate on the subject of bankruptcies. All this means is that with respect to the enactment of statutes on the subject, Congress governs the nation. It does not mean that Congress is the whole of the federal government or can ignore its normal form in selecting the agencies to carry out bankruptcy statutes.

Generally, the power of Congress to pass a statute on a particular subject does not mean it is constitutional for Congress to create non-Article III courts to decide cases arising under the statute. Such a rule would make the constraints of Article III meaningless. That the Constitution gives Congress exclusive power to enact bankruptcy [25] statutes only settles the questions of where the concerns of federalism directed the legislative power. As to how that power can be put into effect, the normal considerations of federalism and separation of powers determine whether a tribunal with bankruptcy jurisdiction must meet the Article III standards.

The decisions of the Supreme Court reveal that there are disputes that can be decided by the Article III courts but may be decided by non-Article III courts. The next question is whether bankruptcy cases are in that category.

The Court of Claims cases reveal that money claims against the United States can be tried in non-Article III courts. This result is constitutionally justifiable on the ground that it presents no separation of powers problem. Because of sovereign immunity and the necessity of Congressional appropriations for the payment of debts of the United States, Congress and the President, as a matter of basic constitutional law, have complete control of the payment of money claims against the United States.[10] The [26] Constitution does not require judges constitutionally independent of Congress to decide cases that Congress could completely decide. *Williams v. United States*, 289 U.S. 553, 53 S.Ct. 751, 77 L.Ed. 1372 (1933), overruled on other grounds, *Glidden v. Zdanok, 370 U.S. 530, 82 S.Ct. '459, 8 L.Ed.2d 671 (1971).*[11]

In *Ex Parte Bakelite Corporation,* the Supreme Court avoided specific case or controversy problems by holding that the Court of Customs Appeals was not an Article III court. 279 U.S. 438, 49 S.Ct. 411, 73 L.Ed. 789 (1929), overruled on other grounds *Glidden v. Zdanok,* cited above.[12] It is not at all clear why the Supreme Court thought enforcement of the customs laws generally could be left to executive officers. Perhaps it was a tradition,

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[10] "No money shall be drawn from the treasury, but in consequence of appropriations made by law..." U.S. Const. Art. I. § 9. cl. 2.

[11] In *Williams* the Supreme Court reasoned that since the jurisdiction of the Court of Claims could be given to a non-Article III court, then it was not an Article III court. *Glidden* rejected this reasoning as a *non sequitur.* It also rejected the conclusion that a suit in which the United States is a defendant is not a controversy to which it is a party as contemplated in § 2. cl. 1 of Art. III.

already existing when the Constitution was adopted, that revenue statutes are enforced in all respects by executive officers. In any event, the case is of little import to the question at hand, [27] since bankruptcy statutes certainly are not revenue laws. The more general rationale suggested in the Court of Claims cases and others is the important one.

It is necessary to understand the public rights rationale suggested in *Den (Murray's Lessee) v. Hoboken Land & Improvement Company*, cited above. The suggested rationale actually says only what the court has already explained. Some disputes between the government and individuals can be finally resolved by Congress and the President because the Constitution allows it. For such disputes, executive officers can be given the power to make decisions that bind the Article III courts as to the facts or both the facts and the law, even though Congress might have brought the controversy within the cognizance of the Article III courts in the first instance. 59 U.S. 284-285, 15 L.Ed. 377-378. Obviously, bankruptcy cases are not primarily disputes between the government and individuals that the Constitution allows to be finally resolved by Congress or the President.

The *Den* opinion also states that the Constitution may allow Congress or the President to decide some disputes between individuals. In such cases, the actions of executive officers can be conclusive. 59 U.S. 284-285, 15 L.Ed. 378. Nothing in the Constitution suggests that bankruptcy cases are in that category.

Finally, the court must distinguish the administrative [28] agency rationale. It allows executive officers to decide in the first instance many cases that do not come under the public rights

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[12] In *Bakelite* the Supreme Court had made the same illogical leap it later made in *Williams*. *See* note 11. The problem suggested by all three cases is that the case or controversy requirement is a difficult-to-apply separation of powers limitation on the kinds of disputes Congress can make into cases or controversies.

rationale and are not disputes between private parties that can be decided by Congress or the President. The administrative agency rationale will be discussed more fully later. At this point, suffice it to say that it depends on limiting the power of administrative agencies.

(5c)

There remains the argument that bankruptcy proceedings are mostly "administrative" in nature. The court has pointed out that bankruptcy jurisdiction as a whole includes matters that are cases or controversies of the kinds usually decided by courts. The characterization as mostly "administrative" apparently means that bankruptcy courts receive documents that are not complaints, answers, or motions under the rules of civil procedure and enter orders that do not settle disputes between plaintiffs and defendants.

A proceeding can be adversarial through the parties are not called plantiff and defendant and the pleading is not carried out according to the rules of civil procedure. An objection to a creditor's claim is perhaps the most basic [29] adversary proceeding in bankruptcy cases. It determines how much a creditor can receive, and affects other rights to participate in the bankruptcy case. The questions raised are not always simple matters of form. The same can be said of objections to confirmation in Chapter 11 or 13 cases. In both situations the proceeding is begun by an "objection," and the parties are not called plantiff and defendant.

Furthermore, it does not make the court an administrative agency because a dispute between particular opposing parties does not arise in every case, and every order does not settle a dispute. The so-called "administrative" actions of the court are directed toward the disposition of such disputes. They also settle

rights and liabilities between creditors and debtors even though no specific dispute has arisen. In this regard, even entry of the discharge order could be considered merely "administrative."[13]

The argument is best treated as meaning that much of what the bankruptcy courts do could be done by an administrative agency. The court doubts that is true, but even if it is, as the court points out later, it is basically irrelevant.

[30] (5d)

The court has found no existing rationale for constitutional non-Article III bankruptcy courts. That does not mean the main issue is completely resolved.

Proper treatment requires the court to consider whether the underlying separation of powers and federalism concerns apply to a court whose jurisdiction is limited to bankruptcy cases and related proceedings.

The bankruptcy courts do not have general jurisdiction of federal civil rights, voting rights, or criminal cases. The bankruptcy courts deal primarily with property rights and contract rights. Perhaps they are not as important as individual liberty and rights to participate in the political process. Nevertheless, they are important rights protected by specific provisions of the Constitution. U.S. Const., Amends. III, IV.

The bankruptcy courts do not have general jurisdiction of federal civil rights, voting rights, or criminal cases. The bankruptcy courts deal primarily with property rights and contract rights. Perhaps they are not as important as individual liberty and rights to participate in the political process. Nevertheless, they are

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[13] The Bankruptcy Reform Act was intended to take much of the administrative burden from the bankruptcy judge so that he will primarily be involved in hearing disputes between particular parties. *See* generally 9 Am.Jur.2d. Bankruptcy § 10 at 58 (1980).

important rights protected by specific provisions of the Constitution. U.S. Const., Ameds. III, IV. The drafters of the Constitution recognized that private property rights operate as a restraint on governmental power and must be protected.

Bankruptcy jurisdiction also extends to cases arising under the Bankruptcy Code, such as discharge and dischargeability cases, and to civil cases related to a bankruptcy case. As a result, the bankruptcy courts can have jurisdiction of antitrust cases, securities fraud cases, employment discrimination cases, patent and trademark infringement [31] cases, and admiralty cases, that would otherwise be heard in Article III court. The court also notes that bankruptcy courts can issue writs of habeas corpus when a debtor is imprisoned pursuant to civil process issued for collection of a debt that is dischargeable or provided for in a plan in a case under Chapter 11 or 13. 28 U.S.C. § 2256; Bankruptcy Reform Act §§ 250 & 405(b).

In deciding the question at hand, the court cannot ignore the full extent of bankruptcy jurisdiction. Whether the judge should have constitutional tenure depends partly on what kinds of cases come before him. The court's jurisdiction of a particular case might be denied on constitutional grounds without affecting its jurisdiction of another case, but the judge is the judge for all cases.

The Constitution does not say that Congress or the President can have a greater opportunity to influence the decisions of a federal court in a broad range of cases simply because they arise in the context of bankruptcy. Federalism concerns are even more evident.

It must be remembered that bankruptcy is generally a modification of specific rights and liabilities arising under state law. It is perhaps the severest possible legal modification of contract rights. In this respect, the federal government's legislative power exceeds that allowed to the states. Cf. U.S. Const., Art. 1, § 10, cl.1.

[32] Since the bankruptcy statutes modify but do not establish the relevant state created rights and liabilities, the states, by changing their statutes, can resist application of the bankruptcy laws. However, the Supremacy Clause may prohibit the states from making some changes that in effect are attempts to modify the bankruptcy statutes. U.S. Const., Art. VI, cl. 2. This is particularly likely with respect to statutes such as § 522(f) of the Bankruptcy Code, dealing with exemptions. 11 U.S.C. § 522(f). *Compare In re Foster*, 16 B.R. 467, 8 BCD 360 (ND OH 1981) and *In re Redin*, 14 B.R. 727, 8 BCD 332 (Bankr. D CO 1981).

Bankruptcy statutes in general exert a powerful influence on what state laws can provide in the areas of exemptions and secured transactions. It is also worth noting that in addition to admiralty jurisdiction, a bankruptcy court can have jurisdiction of a case between citizens of the same state and involving primarily state law, if the case is sufficiently related to the bankruptcy case. Consider, for example, a suit brought in the bankruptcy court by a bankruptcy trustee to collect a debt owed to the debtor. Such "nondiversity" cases are generally excluded from federal jurisdiction because of federalism concerns.

[33] Bankruptcy laws are a broad scale federal invasion of areas of the law generally subject to state control. On the other hand, the bankruptcy statutes should be given their intended affect within constitutional limits, despite pressure to unduly limit them or extend them beyond constitutional limits.

It is difficult to see any constitutional justification for having judges without constitutional tenure exercise the decisionmaking power of the bankruptcy courts. The bankruptcy courts decide cases where the concerns behind constitutional tenure apply. The breadth of bankruptcy court jurisdiction by itself calls for constitutional tenure to secure judicial independence. The bankruptcy

courts are in the constitutional vortex position in our system of government that is reserved for courts that meet the standards of Article III.

Of course, this might be said with respect to some federal administrative agencies, at least as to some of the cases they decide. They, however, lack the power that would make them constitutional arbiters or political agencies in the sense that the bankruptcy courts are. The bankruptcy courts have not only the opportunity to decide but also the power that makes the concerns behind constitutional tenure apply. This brings the court to the administrative agency problem.

[34] (5e)

The court doubts that the reasons for constitutional tenure strongly apply in many cases and controversies decided by administrative agencies, but admits they apply with respect to some. There is constitutional justification for allowing administrators without constitutional tenure to decide such cases, but the explanation escapes concise statement. The following quotation is a good attempt:

> Moreover, in relying on administrative agencies as precedents for Article I courts, this argument gives inadequate weight to the functional difference between agencies and courts. In establishing administrative agencies pursuant to its power over remedies, Congress has not endowed them with judicial power, which may be defined as the ultimate decision making core of the adjudicative function. The exercise of judicial power encompasses far more then making factual determinations. At its minimum it involves rendering binding decisions on points of law that affect or alter the rights and obligations of parties and establish precedents for future

> litigants. It also encompasses certain coercive powers, such as the power to render self-executing judgments or to cite for contempt. Administrative agencies possess neither of these attributes. Although they can adjudicate questions of law, their decisions are not final, but subject to review in Article III courts. Similarly, although agencies can issue coercive orders, they can enforce them only with the aid of an Article III court. Administrative agencies do not, therefore, provide a precedent for broad-scale creation of legislative courts.

[35] Finley, Article III Limits on Article I Courts: The Constitutionality of the Bankruptcy Court and the 1979 Magistrate Act, 80 Colum.L.Rev. 560, 578-580 (1980). *See also* Katz, Federal Legislative Courts, 43 Harv.L.Rev. 894 (1930).

The extent of a tribunal's power is a consideration in determining whether the judge should have constitutional tenure. Administrative agencies are not courts in this respect. The court is concerned only with what Congress did, rather than what it might have done. Congress meant to and did give the bankruptcy courts all the essential powers of a court. This is just as true during the transition period as it will be afterward. *See* 28 U.S.C. §§ 1471, 1475, 1477, 1478, 1479(c), 1480, 1481, 2256; Bankruptcy Reform Act § 405(b); 11 U.S.C. § 105(a). *See also* 28 U.S.C. § 771-775; Bankruptcy Reform Act § 404(e).[14]

There are two insignificant limitations on the powers of a bankruptcy court. A bankruptcy court cannot punish a criminal contempt that was not committed in the judge's presence or a criminal contempt that warrants a punishment of imprisonment.

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[14] These powers relating to clerks, records, and employees may be said to characterize courts rather than define decisionmaking powers that identify a tribunal as a court.

28 U.S.C. § 1481; Bankruptcy [36] Reform Act §§ 405(a)(1) & (b). There are similar limitations on the federal district courts. 18 U.S.C. §§ 401, 402, 3691; Fed. R. Crim. Proc. 42.

A bankruptcy court cannot enjoin another court. Federal district courts do not have the power to enjoin state courts in every case where general principles of equity would allow it. 28 U.S.C. § 2283; Wright, Miller, & Cooper, Federal Practice and Procedure §§ 2942 and 4221-4226 (1978).[15] Furthermore, even when they can enjoin another court, the district courts may refuse to do so on the grounds of comity. Finally, in light of the statutory injunctions and other provisions of the Bankruptcy Code, this is a slight limitation on the powers of the bankruptcy courts. *See* 11 U.S.C. §§ 350(b), 362,524; U.S.C. §§ 1471(e), 1478, 2256; Bankruptcy Reform Act § 405(b).

These two limits on the powers of bankruptcy courts were apparently imposed because Congress thought they would reduce the constitutional problems with creating the bankruptcy courts without constitutionally tenured judges. Removing the limits would make it clearer that the bankruptcy courts exercise "the judicial power" but these powers do [37] not define judicial power. Indeed, the denied powers are rather extraordinary powers that may be properly subject to limitations on their exercise.

Thus far the court has not remarked on whether a hearing on confirmation is the kind of proceeding that requires judicial action and cannot be heard in the first instance by executive officers (an administrative agency). *See Den (Murray's Lessee) v. Hoboken Land & Improvement Company*, cited above. The reason should be evident. Even if it is, that does not mean the bankruptcy judge need not have constitutional tenure. A more general inquiry was necessary. Furthermore, the limitations on the powers of the bankruptcy court are not enough to make it

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[15] The powers denied to the bankruptcy courts are apparently granted to the district courts. Bankruptcy Reform Act § 405(a)(2).

justifiable as an administrative agency. It has "the judicial power." Though "the judicial power" may not be constitutionally required for a particular proceeding, the court's actions may nevertheless amount to exercise of "the judicial power." That is the situation in this case. The parties are entitled to have a judge with constitutional tenure exercise the judicial power.

(5f)

The court thus comes to the conclusion that the bankruptcy courts should have judges with constitutional tenure. All the jurisdiction of the bankruptcy courts could not be given to non-Article III *courts* under existing [38] rationales. There is no apparent rationale for non-Article III courts for this particular subject matter. The reasons for constitutional tenure are applicable to the business of bankruptcy courts, and the bankruptcy courts are not administrative agencies. In terms of how "the judicial power" is interpreted to determine whether a court should have judges with constitutional tenure, the analysis can be summarized as follows.

If the court in question decides cases or controversies of a kind described in Article III, then it is exercising "the judicial power" in its elementary sense. That does not mean the court must be an Article III court. Some disputes within the description of Article III, § 2, can be completely disposed of by Congress, the President, or their agents. Whether this is true depends on the specific separation of powers made by the Constitution with respect to the particular dispute or kind of dispute. The Constitution does not give Congress or the President any special power with respect to the decision of cases or controversies of the kinds decided by the bankruptcy courts. It is nevertheless true that Congress has created non-Article III administrative agencies to decide cases and controversies for which the Constitution does not provide any special distribution of decisionmaking power. The [39] difference recognized by Congress and the courts is that the decisionmaking power of administrative agencies is restricted so that they

do not completely perform the constitutional, political function of the Article III courts. *See generally* M. Shapiro, The Supreme Court and Administrative Agencies (1968). On the other hand, the powers of the bankruptcy courts are complete. Thus, the bankruptcy courts exercise "the judicial power of the United States" in the sense that they must have judges with constitutional tenure.

(5g)

The court cannot leave this subject without disposing of two arguments that did not fit into the narrative so far.

First is the argument that practical concerns can justify the creation of non-Article III courts. As to the bankruptcy courts, it is argued that the volume of business varies with the performance of the economy, and so the number of judges must be variable. This is similar to the argument, that if the territorial courts must be Article III courts, then the United States might have too many courts and judges when the territory becomes a state.[16] *American Insurance Co. v. Carter*, cited above.

[40] The volume of litigation in most Article III courts varies with changing conditions. Furthermore, Congress can control the jurisdiction of the inferior Article III courts. Congress may restrict their jurisdiction though some constitutionally tenured judges are idled. The variability of the volume of business in relation to the number of judges is also a problem whenever Congress creates an Article III court.

Practical concerns should guide the courts in interpretation of the Constitution but not to the point of overriding its fundamental limitations. There is no principle of constitutional law that allows

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[16] This appears to be a straw man argument. The problem should not exist at least with respect to courts in territories that become states. Of course, Congress should not be able to abolish an Article III court solely for the purpose of removing the judge.

Congress to create a court without regard to Article III whenever the nature of the court's subject matter jurisdiction gives rise to practical reasons for having judges without constitutional tenure. There are other ways, primarily the creation of administrative agencies, to avoid this problem without testing the limits of Article III.

As to the non-Article III military courts and courts in the territories and the District of Columbia, the Constitution recognizes practical problems as to the *form of government* that justify the creation of non-Article III federal courts. Except for those practical concerns, the argument must be considered a makeweight, despite the [41] Supreme Court's continued reliance. See *Palmore v. United States,* cited above; *Glidden v. Zdanok,* cited above.

In the second argument the trustee attempts to classify bankruptcy cases as among those justiciable in Article III or non-Article III courts. The argument is not based on Congress' power to decide or control the decision in any particular disputes arising in bankruptcy cases. It is based on Congress' power to pass bankruptcy statutes.

In *Schumacher v. Beeler,* the Supreme Court was concerned with a case in the federal district court between a bankruptcy trustee and an adverse claimant of property. There was no attempt to prove diversity jurisdiction or jurisdiction *(in rem)* based on the court's control of the property in question, 293 U.S. 367, 55 S.Ct. 230, 79 L.Ed. 433 (1934). When a federal court lacked control of the property, § 23b of the Bankruptcy Act allowed jurisdiction if it would have had jurisdiction regardless of the bankruptcy case or if the adverse claimant consented. The Supreme Court said:

> The Congress, by virtue of its constitutional authority over bankruptcies. . .could confer or withhold

> jurisdiction to entertain such suits and could prescribe the condition on which the federal courts should have jurisdiction.

293 U.S. 374, 55 S.Ct. 233.

[42] This suggests that Congress can constitutionally confer jurisdiction of such cases on non-Article III federal courts only becuause of its "constitutional authority over bankruptcies." *See also Williams v. Austrian*, 331 U.S. 642, 67 S.Ct. 1443, 91 L.Ed. 1718 (1947). The quotation must be read in light of the unclearly stated premise of the opinion, that the case in question was a case arising under a federal statute within the meaning of Article III and constitutionally could be heard in the Article III courts.[17]

The point of the quotation is that the Constitution does not require Congress to give the lower federal courts jurisdiction of every case or controversy justiciable in an Article III court. Furthermore, for such cases Congress can impose consent as a prerequisite to jurisdiction or use it as a ground of statutory jurisdiction. The question was not whether the Constitution allowed federal jurisdiction, but whether Congress could condition it on consent.

The reference to Congress' "constitutional authority over bankruptcies" could be read as a misstatement, since the relevant power was Congress' power to control jurisdiction of the lower Article III courts. Or, the [43] Supreme Court could have meant that such cases should be considered cases arising under a federal statute because of the broad constitutional scope of bankruptcy statutes.[18] Perhaps the Supreme Court meant only to state the

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[17] The premise was probably unclearly stated because the Supreme Court had not clearly decided the issue. Note, Bankruptcy and the Limits of Federal Jurisdiction, 95 Harv. L. Rev. 703, 711-713 (1982).

[18] If bankruptcy can include a complete wrapping up of the debtor's financial affairs, then *most* related cases are merely disputes arising under the bankruptcy statutes.

obvious, that Congress' power to pass the jurisdictional statute was part of its general power to pass statutes on the subject of bankruptcy.

It is certain the Supreme Court did not mean to say what the trustee says, which is what three justices said in *National Mutual Insurance Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 69 S.Ct. 1173, 93 L.Ed. 1556 (1949).

In the *Tidewater* case, Justice Jackson argued that Congress can constitutionally impose on the Article III courts jurisdiction of cases not of a kind described in Article III. As an example, he said nondiversity cases brought by bankruptcy trustees but involving only questions of state law are not cases arising under a federal statute, yet they can be heard in the Article III courts. The argument was based on misreading the *Schumacher* and *Austrian* cases in the same way that the trustee has misread them.

Justice Jackson's argument and example were [44] rejected by six justices. The argument is so obviously wrong it is difficult to refute. By passing statutes, Congress can create cases arising under federal statutes, but it cannot add to the descriptions of Article III, § 2, cl. 1. The trustee argues that all bankruptcy matters generally are within the class of cases for which Justice Jackson argued in *Tidewater*. The majority of the Supreme Court clearly rejected the notion that such a class of cases exists.

(6)

The court has decided that the bankruptcy judges should have constitutional tenure. The court turns now to the question of whether the relationship between the bankruptcy courts and the federal district court makes it constitutional for the bankruptcy judges to exercise "the judicial power" though they lack constitutional tenure.

The trustee argues that the right to appeal to an Article III court is all that is required. In other words, even if all the considerations underlying the standards of Article III apply to the lower court, it need not meet those standards so long as there is a right to appeal to an Article III court.

This essentially follows the argument that since Congress need not create lower Article III courts and can [45] let the state courts decide, then non-Article III federal courts are always constitutional. The court has already pointed out the fallacy of that argument. Moreover, if a judge with constitutional tenure is required because of the function and political place of the court, it does not matter that there are Article III courts to hear appeals from its decisions. Section 1 of Article III explicitly requires that the judges of any federal court, at whatever level, have constitutional tenure if the court exercises "the judicial power."

The trustee also argues that decisions by a bankruptcy court are subject to a "*de novo* determination" by the federal district court in the same district. *United States v. Raddatz*, 447 U.S. 667, 100 S.Ct. 2406, 65 L.Ed.2d 424 (1980). In *Raddatz*, the district judge referred a motion to suppress evidence in a criminal case to the magistrate. The magistrate heard the evidence, made findings of fact, and recommended to the district judge that the motion be denied. The district judge reviewed the transcript of the hearing, the magistrate's report, and the pleadings and memoranda filed by the parties. He denied the motion without hearing the witnesses. The Supreme Court held the procedure was constitutional despite Article III problems:

[46] Thus, although the statute permits the district court to give to the magistrate's proposed findings of fact and recommendations "such weight as [their] merit commands and the sound discretion of the judge warrants"... that delegation does not violate Art. III so long as the ultimate decision is made by the judge.

100 S.Ct. 2416.

It is evident what the Supreme Court meant by a "*de novo* determination." The district judge is not bound to give any particular weight to the magistrate's findings of fact. He is not required to accept them even if supported by substantial evidence in the record. Furthermore, if he is dissatisfied with the record, he can hear the witnesses himself or require the magistrate to hold another hearing. That decision is in his "sound discretion."

On the other hand, the district court, as an appellate court for decisions of the bankruptcy court, must accept its findings of fact unless clearly erroneous. Bankruptcy Reform Act § 405(a) and (d); Bankruptcy Rule 801. Obviously, this denies the district judge the right to make a "*de novo* determination" within the meaning of *Raddatz*.[19]

It does not help the argument to refer to administrative agency fact-finding. With regard to them, it is first necessary to identify the Article III problem.

[47]The problem is not withtaking away jurisdiction of functions that *could* be performed by an Article III court. The problem is with giving "the judicial power" to non-Article III administrative agencies. There is no problem when the agency is legislating or performing functions reserved to the executive branch. There is less of a problem when the agency is deciding only cases or controversies that could, under existing rationales, be decided by a non-Article III court. The problem is most apparent when the agency decides cases or controversies that could be decided by an Article III court but not by a non-Article III federal court. When it finds the facts, an executive agency is

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[19] By agreement parties may appeal directly to the court of appeals, 28 U.S.C. § 1293; Bankruptcy Reform Act §§ 236 and 405(c)(2).

performing part of the function that *under the federal government* appears to be reserved to the judiciary branch. It is a separation of powers problem.[20]

It is easy to see that fact-finding is not a complete exercise of the judicial power but only one step in the process leading to its exercise. The scope of judicial review of the facts must vary with the constitutional [48] importance of the issues to which they are relevant.[21] For especially important "political rights," the lower Article III courts or the Supreme Court are more likely to hold that judicial review of the findings of fact is not only constitutionally required but must have a broad scope. For some cases, it might even be held that the fact-finding function cannot be given to executive agencies, or if it can, the findings can be given little weight or binding effect in the Article III courts.[22]

It should be apparent that for many issues decided by administrative agencies, a narrow scope of review of their findings of fact is justified. Furthermore, the necessary scope of judicial review as a constitutional separation of powers limitation on agency fact-finding can be determined by the Article III courts only as cases come from the administrative agencies. For any particular case or issue, it is extremely difficult to say to what extent administrative agency fact-finding by itself intrudes on the sphere of action reserved to the judicial branch of the federal government.

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[20] "It is rather the question of the appropriate maintenance of the federal judicial power in requiring the observance of constitutional restrictions. It is the question whether the Congress may substitute for constitutional courts . . . an administrative agency . . . for the final determination of the facts upon which the enforcement of the constitutional rights of the citizens depend." *Crowell v. Benson*, 285 U.S. 22, 56-57, 52 S.Ct. 285, 294-95, 76 L.Ed. 598 (1931).

[21] The much vaunted change in the law since *Crowell v. Benson*, has taken place with respect to this part of the question.

[22] Consider to what extent an administrative agency could be given the power to find the facts regarding a motion to suppress evidence in a federal criminal prosecution or regarding a claim of denial of equal protection by a state's peculiar voting rights statutes.

[49] It is not a problem in this case. The bankruptcy courts are not administrative agencies. It is irrelevant that the court's findings of fact might have the same effect if it was an agency. If it was an agency, its power would be limited to the extent necessary to deprive it of "the judicial power." That is not the case. When a bankruptcy court finds the facts, it is exercising "the judicial power."

The trustee's final argument is based on the relationship between the district court and the bankruptcy court for the same district. It is a continuation of the *Raddatz* argument on a broader scale. The idea is that the bankruptcy court is sufficiently within the control of the district court that the district judge is a constitutionally tenured judge for the bankruptcy court. The idea is expressed in the following quotation from Justice Blackmun's concurring opinion in *Raddatz*:

> [T]he handling of suppression motions invariably remains completely in the control of the federal district court. The judge may initially decline to refer any matter to a magistrate. When a matter is referred, the judge may freely reject the magistrate's recommendation. He may rehear the evidence in whole or in part. He may call for additional findings or otherwise "recommit the matter to the magistrate with instruction." [Citation omitted.] Moreover, the magistrate himself is subject to the Art. III judge's control. Magistrates are appointed by district judges . . . and subject to removal by them . . . In addition, district [50] judges retain plenary authority over when, what, and how many pretrial matters are assigned to magistrates . . . Thus, the only conceivable danger of a "threat" to the "independence" of the magistrate comes from within, rather than without, the judicial department.

> Even assuming that, despite these protections a controversial matter might be delegated to a magistrate who is susceptible to outside pressures, the District Judge — insulated by life tenure and irreducible salary — is waiting in the wings, fully able to correct errors. Under these circumstances, I simply do not perceive the threat to the judicial power or the independence of judicial decisionsmaking that underlies Art. III. We do not face a procedure under which "Congress [has] delegate[d] to a non-Art. III judge the authority to make final determinations on issues of fact"... Rather, we confront a procedure under which Congress has vested in Art. III judges the discretionary power to delegate certain functions to competent and impartial assistants, while ensuring that the judges retain complete supervisory control over the assistants' activities.

100 S.Ct. 2417-2418.

Generally, there are two kinds of connections that taken together could make the district judge the judge of the bankruptcy court for Article III purposes. One is personsal supervisory power over the bankruptcy judge and the bankruptcy court. By far the more important kind of connection is the ability to exercise judicial power in bankruptcy cases and civil proceedings in the bankruptcy court.

The subject matter jurisdiction exercised by the bankruptcy courts in cases under the Bankruptcy Code is [51] vested in the district courts with the bankruptcy courts as "separate departments" of the district courts. 28 U.S.C. § 1471; Bankruptcy Reform Act §§ 404(a) and 405(b).

This does not mean the district court has any judicial power it can exercise in a bankruptcy case or civil proceeding pending in the bankruptcy court. The statutes leave little doubt that the

district judge has practically no power to issue orders in a bankruptcy case or civil proceeding pending in the bankruptcy court. Section 1471(c) of 28 U.S.C. provides:

> The bankruptcy court for the district in which a case under Title II is commenced shall exercise all of the jurisdiction conferred by this section on the district courts.

This does not directly say the district courts are prohibited from exercising any of the jurisdiction given them, but the legislative history makes it clear that this section was intended to have that effect with respect to almost all bankruptcy jurisdictions.

The Senate was opposed to the creation of Article III bankruptcy courts and ultimately prevailed. Its version of subsection (c) said that the bankruptcy courts "may" exercise the jurisdiction given to the district courts. The report of the Senate Judiciary Committee explained:

> [52] The use of the term "may" in this section is not intended to imply that the district court has any discretion whatsoever in withholding bankruptcy cases or civil proceedings arising under Title II or arising under or related to a case under Title II from the bankruptcy court... It is the intent of these provisions that the bankruptcy court will receive and the bankruptcy judge will handle cases and proceedings under Title II, an that all actions filed under [§ 147(b)]... will be automatically referred to the bankruptcy judge. It is contemplated that the rules of Bankruptcy Procdure will be adopted to carry out this intent in order that the bankruptcy judge shall exercise the full range of jurisdiction in bankruptcy cases and proceedings... [T]he district judge will be expected to act in Title II cases only in limited instances (1) where it is necessary to enjoin a State or Federal court or (2) to punish a person for

> contempt by imprisonment or by a fine of more than $1,000. Otherwise, the district judge will function only as an appellate judge in bankruptcy matters...

S. Rep. No. 95-989, 95th Cong., 2d Sess. 154 (1978)

In an attempted compromise vesting jurisdiction in the courts of appeals, the House used "shall" instead of "may." The bill as finally enacted was the House's suggested compromise amended to substitute "district courts" in all the relevant provisions that had referred to the courts of appeal. 1 Collier on Bankruptcy para. 1.03[5] at 1-50 - 1-53.[23] [53]Certainly, the word "shall" is a better expression of what the Senate intended by using "may."

Except on appeal, the district court's jurisdiction gives the district judge only those powers denied to the bankruptcy court — the power to punish some criminal contempts and the power to enjoin another court. Section 405(a)(2) of the Bankruptcy Reform Act apparently reserves those powers to the district court but does not give it any general powers. The grant of jurisdiction to the district courts is meaningless except for the contempt and injunctive powers reserved to the district judge.

The district judge's lack of power to act in bankruptcy proceedings practically answers the question. He lacks the ultimate decisionmaking power. He lacks control of the decisionmaking process except in the role of appellate judge. The court has already rejected the argument that the right to appeal to an Article III court solves the constitutional problem. Likewise, the

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[23] "It was thus perfectly plain from Section 1471... added ... by this amendment to H.R. 8200, that the bankruptcy courts, though adjuncts of the courts of appeals, were to be the repositories for the exercise of all of the judicial functions flowing from the conferral of that jurisdiction, and the bankruptcy court was to exercise all of this jurisdiction through its judicial officers." *Id.* at 1-53.

district judge's power as an appellate judge does not give him sufficient control of the bankruptcy court's judicial power to make him a constitutionally tenured judge for the bankruptcy court.

In light of the dearth of decisionmaking power in the district court, it is difficult to see how giving the [54] district judge personal supervisory power over the bankruptcy judge would make a constitutional difference. During the transition period the district judges retain some of the power they had under the Bankruptcy Act. *New* bankruptcy judges must still be appointed by the judge or judges of the district court. Likewise, removal for cause is still within the power of the district judge or judges. Bankruptcy Reform Act § 404(b) and (d); Bankruptcy Act § 34. II U.S.C. § 62.

The fact that a new bankruptcy judge "owes" his appointment to the district judge is not likely to induce in him a feeling of dependence or need for approval of his actions, since the power to reappoint will be in the President. Bankruptcy Reform Act § 201 (28 U.S.C. § 152); § 402(b); §404(b)-(d). In any event, the appointment power can only affect *new* bankruptcy judges.

Thus, it is the power to remove that must be the main source of supervisory power in the district judge. Included in the causes for removal are incompetency and neglect of duty. A district judge might urge these grounds for removal of a bankruptcy judge whose decisions he disagreed with. Such an action would be uncharacteristic of district judges. Removal cannot be carried out immediately and is a dire remedy not likely to be often threatened. Furthermore, over the years the district courts and judges have sought to [55] decrease their involvement in bankruptcy matters. H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 14 (1977). The court does not believe the removal power gives the district judge the kind of day-to-day supervisory power that makes for control of the decisionmaking processes of the bankruptcy court.

As to the day-to-day operation of the bankruptcy court, it has been separated from the district court and freed from control by the district judge. Bankruptcy Reform Act § 404(e) and (f).

The trustee has attempted to bolster this argument by saying that the court system under the Bankruptcy Act had envolved to practically the same point, yet that system was constitutional.

The trustee has not pointed out any case that held it was constitutional. Furthermore, though the degree of connection between the district court and the bankruptcy court was unclear under the Bankruptcy Act and Rules of Procedure, the severance of all connections is apparent under the Bankruptcy Code and accompanying amendments to 28 U.S.C. It is only during the transition period that a few connections remain, and they are not enough to support the trustee's argument that the bankruptcy courts are merely subordinate agents of the district courts subject to the supervision and control of the district judges.

[56] The court thus comes to the final conclusion that there is no constitutional justification for having judges without constitutional tenure exercise the powers of the bankruptcy courts. It is basic to our system of government and to our freedom that Congress conform to Article III of our Constitution. It has not done so.[24]

Conclusion

The transition statutes show Congress' intent to postpone until 1984 a complete break from the court system that existed under the Bankruptcy Act. Bankruptcy Reform Act § 404(a); Bankruptcy Act §§ 1(10) & 2a. 11 U.S.C. §§ 1 and 11. The bankruptcy courts could have been made sufficiently dependent on the district

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[24] The same conclusion has been reached with respect to bankruptcy court jurisdiction of civil proceedings related to a bankruptcy case. The decision is now before the Supreme Court for review. *Marathon Pipeline Company v. Northern Pipeline Construction Co.*, 12 B.R. 946, 7BCD 1373, 5 C.B.C.2d 114 (1981).

courts that there would be no constitutional problem, but Congress failed to follow that course. The jurisdiction and transition statutes that make the bankruptcy courts essentially independent of the district courts result in vesting "the judicial power" in courts without constitutionally tenured judges.[25] *See* especially 28 U.S.C. § 1471(c). The jurisdiction of the bankruptcy [57] court cannot be constitutionally exercised by the bankruptcy judge.

The case must be dismissed. However, there are no other federal courts with the statutory authority or the time and resources necessary to handle bankruptcy cases. The order of dismissal will be stayed pending a final appellate decision in this case.

This memorandum constitutes findings of fact and conclusions of law. Bankruptcy Rule 752.

At Chattanooga, Tennessee.

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[25] The power of appointment is vested in the President at the end of the transition period. Giving the executive branch the power of appointment will make the system even more objectionable under Article III. The court being unconstitutional will expire on March 31, 1984 and all pending cases will be taken over by the district courts.

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF TENNESSEE

IN RE:	)	
	)	
ULYSSES RIVERS, JR.	)	**No. 1-81-00682**
	)	
	)	**Chapter 13**
	)	
Debtor	)	

ORDER

Upon the motion of Alabama Furniture Company, a secured creditor of the debtor, Ulysses Rivers, Jr., to modify the judgment of the Court entered April 14, 1982, the Court having already considered the matters encompassed within the motion in the memorandum opinion and order of April 14, 1982, and having found the Bankruptcy Reform Act of 1978 to be otherwise in effect, the motion to modify judgment shall be and the same is overruled.

The order of April 14, 1982, as stayed by the Court, remains in full force and effect.

IT IS SO ORDERED.

At Chattanooga, Tennessee.

BY THE COURT

Ralph H. Kelley
United States Bankruptcy Judge

BANKRUPTCY CODE, 11 U.S.C. §§ 301-304, 362, 363

§ 301. Voluntary cases. A voluntary case under a chapter of this title is commenced by the filing with the bankruptcy court of a petition under such chapter by an entity that may be a debtor under such chapter. The commencement of a voluntary case under a chapter of this title constitutes an order for relief under such chapter.

§ 302. Joint cases.

(a) A joint case under a chapter of this title is commenced by the filing with the bankruptcy court of a single petition under such chapter by an individual that may be a debtor under such chapter and such individual's spouse. The commencement of a joint case under a chapter of this title constitutes an order for relief under such chapter.

(b) After the commencement of a joint case, the court shall determine the extent, if any, to which the debtors' estates shall be consolidated.

§ 303. Involuntary cases.

(a) An involuntary case may be commenced only under chapter 7 or 11 of this title, and only against a person, except a farmer or a corporation that is not a moneyed, business, or commercial corporation, that may be a debtor under the chapter under which such case is commenced.

(b) An involuntary case is commenced by the filing with the bankruptcy court of a petition under chapter 7 or 11 of this title

(1) by three or more entities, each of which is either a holder of a claim against such person that is not contingent as to liability or an indenture trustee representing such a

holder, if such claims aggregate at least $5,000 more than the value of any lien on property of the debtor securing such claims held by the holders of such claims;

(2) if there are fewer than 12 such holders, excluding any employee or insider of such person and any transferee of a transfer that is voidable under section 544, 545, 547, 548, 549, or 724(a) of this title, by one or more of such holders that hold in the aggregate at least $5,000 of such claims ;

(3) if such person is a partnership —

(A) by fewer than all of the general partners in such partnership; or

(B) if relief has been ordered under this title with respect to all of the general partners in such partnership, by a general partner in such partnership, the trustee of such a general partner, or a holder of a claim against such partnership; or

(4) by a foreign representative of the estate in a foreign proceeding concerning such person.

(c) After the filing of a petition under this section but before the case is dismissed or relief is ordered, a creditor holding an unsecured claim that is not contingent, other than a creditor filing under subsection (b) of this section, may join in the petition with the same effect as if such joining creditor were a petitioning creditor under subsection (b) of this section.

(d) The debtor, or a general partner in a partnership debtor that did not join in the petition, may file an answer to a petition under this section.

(e) After notice and a hearing, and for cause, the court may require the petitioners under this section to file a bond to indemnify the debtor for such amounts as the court may later allow under subsection (i) of this section.

(f) Notwithstanding section 368 of this title, except to the extent that the court orders otherwise, and until an order for relief in the case, any business of the debtor may continue to operate, and the debtor may continue to use, acquire or dispose of property as if an involuntary case concerning the debtor had not been commenced.

(g) At any time after the commencement of an involuntary case under chapter 7 of this title but before an order for relief in the case, the court, on request of a party in interest, after notice to the debtor and a hearing, and if necessary to preserve the property of the estate or to prevent loss to the estate, may appoint an interim trustee under section 701 of this title to take possession of the property of the estate and to operate any business of the debtor. Before an order for relief, the debtor may regain possession of property in the possession of a trustee ordered appointed under this subsection if the debtor files such bond as the court requires, conditioned on the debtor's accounting for and delivering to the trustee, if there is an order for relief in the case, such property, or the value, as of the date the debtor regains possession, of such property.

(h) If the petition is not timely controverted, the court shall order relief against the debtor in an involuntary case under the chapter under which the petition was filed. Otherwise, after trial, the court shall order relief against the debtor in an involuntary case under the chapter under which the petition was filed, only if —

(1) the debtor is generally not paying such debtor's debts as such debts become due; or

(2) within 120 days before the date of the filing of the petition, a custodian, other than a trustee, receiver, or agent

appointed or authorized to take charge of less than substantially all of the property of the debtor for the purposes of enforcing a lien against such property, was appointed or took possession.

(i) If the court dismisses a petition under this section other than on consent of all petitioners and the debtor, and if the debtor does not waive the right to judgment under this subsection, the court may grant judgment —

(1) against the petitioners and in favor of the debtor for —

(A) costs;

(B) a reasonable attorney's fee; or

(C) any damages proximately caused by the taking of possession of the debtor's property by a trustee appointed under subsection (g) of this section or section 1104 of this title; or

(2) against any petitioner that filed the petition in bad faith, for

(A) any damages proximately caused by such filing; or

(B) punitive damages.

(j) Only after notice to all creditors and a hearing may the court dismiss a petition filed under this section —

(1) on the motion of a petitioner;

(2) on consent of all petitioners and the debtors; or

(3) for want of prosecution.

(k) Notwithstanding subsection (a) of this section, an involuntary case may be commenced against a foreign bank that is not

engaged in such business in the United States only under chapter 7 of this title and only if a foreign proceeding concerning such bank is pending.

§ 304.

Cases ancillary to foreign proceedings.

(a) A case ancillary to a foreign proceeding is commenced by the filing with the bankruptcy court of a petition under this section by a foreign representative.

(b) Subject to the provisions of subsection (c) of this section, if a party in interest does not timely controvert the petition, or after trial, the court may —

(1) enjoin the commencement or continuation of —

(A) any action against —

(i) a debtor with respect to property involved in such foreign proceeding; or

(ii) such property; or

(B) the enforcement of any judgment against the debtor with respect to such property, or any act or the commencement or continuation of any judicial proceeding to create or enforce a lien against the property of such estate;

(2) order turnover of the property of such estate, or the proceeds of such property, to such foreign representative; or

(3) order other appropriate relief.

(c) In determining whether to grant relief under subsection (b) of this section, the court shall be guided by what will best assure an economical and expeditious administration of such estate, consistent with —

(1) just treatment of all holders of claims against or interests in such estate;

(2) protection of claim holders in the United States against prejudice and inconvenience in the processing of claims in such foreign proceeding;

(3) prevention of preferential or fraudulent dispositions of property of such estate;

(4) distribution of proceeds of such estate substantially in accordance with the order prescribed by this title;

(5) comity; and

(6) if appropriate, the provision of an opportunity for a fresh start for the individual that such foreign proceeding concerns.

§ 362. Automatic stay.

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title operates as a stay, applicable to all entities, of —

(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

(2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;

(3) any act to obtain possession of property of the estate or of property from the estate;

(4) any act to create, perfect, or enforce any lien against property of the estate;

(5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;

(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;

(7) the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor; and

(8) the commencement or continuation of a proceeding before the United States Tax Court concerning the debtor.

(b) The filing of a petition under section 301, 302, or 303 of this title does not operates as a stay —

(1) under subsection (a) of this section, of the commencement or continuation of a criminal action or proceeding against the debtor;

(2) under subsection (a) of this section, of the collection of alimony, maintenance, or support from property that is not property of the estate;

(3) under subsection (a) of this section, of any act to perfect an interest in property to the extent that the trustee's rights and powers are subject to such perfection under section 546(b) of this title;

(4) under subsection (a)(1) of this section, of the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power;

(5) under subsection (a)(2) of this section, of the enforcement of a judgment, other than a money judgment,

obtained in an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power;

(6) under subsection (a)(7) of this section, of the setoff of any mutual debt and claim that are commodity futures contracts, forward commodity contracts, leverage transactions, options, warrants, rights to purchase or sell commodity futures contracts or securities, or options to purchase or sell commodities or securities;

(7) under subsection (a) of this section, of the commencement of any action by the Secretary of Housing and Urban Development to foreclose a mortgage or deed of trust in any case in which the mortgage or deed of trust held by said Secretary is insured or was formerly insured under the National Housing Act and covers property, or combinations of property, consisting of five or more living units; or

(8) under subsection (a) of this section, of the issuance to the debtor by a governmental unit of a notice of tax deficiency.

(c) Except as provided in subsections (d), (e), and (f) of this section —

(1) the stay of an act against property of the estate under subsection (a) of this section continues until such property is no longer property of the estate; and

(2) the stay of any other act under subsection (a) of this section continues until the earliest of —

(A) the time the case is closed;

(B) the time the case is dismissed; and

(C) if the case is a case under chapter 7 of this title concerning an individual or a case under chapter 9, 11, or 13 of this title, the time a discharge is granted or denied.

(d) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay —

(1) for cause, including the lack of adequate protection of an interest in property of such party in interest; or

(2) with respect to a stay of an act against property, if —

(A) the debtor does not have an equity in such property; and

(B) such property is not necessary to an effective reorganization.

(e) Thirty days after a request under subsection (d) of this section for relief from the stay of any act against property of the estate under subsection (a) of this section, such stay is terminated with respect to the party in interest making such request, unless the court, after notice and a hearing, orders such stay continued in effect pending, or as a result of, a final hearing and determination under subsection (d) of this section. A hearing under this subsection may be a preliminary hearing, or may be consolidated with the final hearing under subsection (d) of this section. If the hearing under the subsection is a preliminary hearing —

(1) the court shall order such stay so continued if there is a reasonable likelihood that the party opposing relief from such stay will prevail at the final hearing under subsection (d) of this section; and

(2) such final hearing shall be commenced within thirty days after such preliminary hearing.

(f) The court, without a hearing, shall grant such relief from the stay provided under subsection (a) of this section as is necessary to prevent irreparable damage to the interest of an entity in property, if such interest will suffer such damage before there is an opportunity for notice and a hearing under subsection (d) or (e) of this section.

(g) In any hearing under subsection (d) or (e) of this section concerning relief from the stay of any act under subsection (a) of this section —

(1) the party requesting such relief has the burden of proof on the issue of the debtor's equity in property; and

(2) the party opposing such relief has the burden of proof on all other issues.

§ 363. Use, sale or lease of property.

(a) In this section, "cash collateral" means cash, negotiable instruments, documents of title, securities, deposit accounts, or other cash equivalents in which the estate and an entity other than the estate have an interest.

(b) The trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate.

(c)(1) If the business of the debtor is authorized to be operated under section 721, 1108, or 1304 of this title and unless the court orders otherwise, the trustee may enter into transactions, including the sale or lease of property of the estate, in the ordinary course of business, without notice or a hearing, and may use property of the estate in the ordinary course of business without notice or a hearing.

(2) The trustee may not use, sell, or lease cash collateral under paragraph (1) of this subsection unless —

(A) each entity that has an interest in such cash collateral consents; or

(B) the court, after notice and a hearing, authorizes such use, sale, or lease in accordance with the provisions of this section.

(3) Any hearing under paragraph (2)(B) of this subsection may be a preliminary hearing or may be consolidated with a hearing under subsection (c) of this section, but shall be scheduled in accordance with the needs of the debtor. If the hearing under paragraph (2)(B) of this subsection is a preliminary hearing, the court may authorize such use, sale, or lease only if there is a reasonable likelihood that the trustee will prevail at the final hearing under subsection (e) of this section. The court shall act promptly on any request for authorization under paragraph (2)(B) of this subsection.

(4) Except as provided in paragraph (2) of this subsection, the trustee shall segregate and account for any cash collateral in the trustee's possession, custody, or control.

(d) The trustee may use, sell, or lease property under subsection (b) or (c) of this section only to the extent not inconsistent with any relief granted under section 362(c), 362(d), 362(e), or 362(f) of this title.

(e) Notwithstanding any other provision of this section, at any time, on request of an entity that has an interest in property used, sold, or leased, or proposed to be used, sold, or leased, by the trustee, the court shall prohibit or condition such use, sale, or lease as is necessary to provide adequate protection of such interest. In any hearing under this section, the trustee has the burden of proof on the issue of adequate protection.

(f) The trustee may sell property under subsection (b) or (c) of this section free and clear of any interest in such property of an entity other than the estate, only if —

(1) applicable nonbankruptcy law permits sale of such property free and clear of such interest;

(2) such entity consents;

(3) such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of such interest;

(4) such interest is in bona fide dispute; or

(5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.

(g) Nothwithstanding subsection (f) of this section, the trustee may sell property under subsection (b) or (c) of this section free and clear of any vested or contingent right in the nature of dower or curtesy.

(h) Notwithstanding subsection (f) of this section, the trustee may sell both the estate's interest, under subsection (b) or (c) of this section, and the interest of any co-owner in property in which the debtor had, immediately before the commencement of the case, an undivided interest as a tenant in common, joint tenant, or tenant by the entirety, only if —

(1) partition in kind of such property among the estate and such co-owners is impracticable;

(2) sale of the estate's undivided interest in such property would realize significantly less for the estate than sale of such property free of the interests of such co-owners;

(3) the benefit to the estate of a sale of such property free of the interests of co-owners outweighs the detriment, if any, to such co-owners; and

(4) such property is not used in the production, transmission, or distribution, for sale, of electric energy or of natural or synthetic gas for heat, light, or power.

(i) Before the consummation of a sale of property to which subsection (g) or (h) of this section applies, or of property of the estate that was community property of the debtor and the debtor's spouse immediately before the commencement of the case, the debtor's spouse, or a co-owner of such property, as the case may be, may purchase property at the price at which such sale is to be consummated.

(j) After a sale of property to which subsection (g) or (h) of this section applies, the trustee shall distribute to the debtor's spouse or the co-owners of such property, as the case may be, and to the estate, the proceeds of such sale, less the costs and expenses, not including any compensation of the trustee, of such sale, according to the interests of such spouse or co-owners, and of the estate.

(k) At a sale under subsection (b) of this section property that is subject to a lien that secures an allowed claim, if the holder of such claim purchases such property, such holder may offset such claim against the purchase price of such property.

(l) The trustee may use, sell, or lease property under subsection (b) or (c) of this section, or a plan under chapter 11 or 13 of this title may provide for the use, sale, or lease of property, notwithstanding any provision in a contract, a lease, or applicable law that is conditioned on the insolvency or financial condition of the debtor, on the commencement of a case under this title concerning the debtor, or on the appointment of a taking possession by a trustee in a case under this title or a custodian, and that effects, or gives an option to effect, a forfeiture, modification, or termination of the debtor's interests in such property.

(m) The reversal or modification on appeal of an authorization under subsection (b) or (c) of this section of a sale or lease of

property does not affect the validity of a sale or lease under such authorization to an entity that purchased or leased such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale or lease were stayed pending appeal.

(n) The trustee may void a sale under this section if the sale price was controlled by an agreement among potential bidders at such sale, or may recover from a party to such agreement any amount by which the value of the property sold exceeds the price at which such sale was consummated, and may recover any costs, attorneys' fees, or expenses incurred in voiding such sale or recovering such amount. The court may grant judgment in favor of the estate and against any such party that entered into such agreement in willful disregard of this subsection for punitive damages in addition to any recovery under the preceding sentence.

28 U.S.C. § 1471. Jurisdiction.

(a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11.

(b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11 or arising in or related to cases under title 11.

(c) The bankruptcy court for the district in which a case under title 11 is commenced shall exercise all of the jurisdiction conferred by this section on the district courts.

(d) Subsection (b) or (c) of this section does not prevent a district court or a bankruptcy court, in the interest of justice, from abstaining from hearing a particular proceeding arising under

title 11 or arising in or related to a case under title 11. Such abstention, or a decision not to abstain, is not reviewable by appeal or otherwise.

(e) The bankruptcy court in which a case under title 11 is commenced shall have exclusive jurisdiction of all the property, wherever located, of the debtor, as of the commencement of such case.

Pub.L.No. 95-598, Title IV (Transition)
92 Stat. 2549 § 401-404

§ 401 (a) The Bankruptcy Act is repealed.

(b) Section 3 of the Act entitled "An Act to amend an Act entitled 'An Act to establish a uniform system of bankruptcy throughout the United States', approved July 1, 1898, and Acts amendatory thereof and supplementary thereto", approved March 3, 1933 (47 Stat. 1482; 11 U.S.C. § 101a), is repealed.

(c) Sections 3, 6, and 7 of the Act entitled "An Act to amend an Act entitled 'An Act to establish a uniform system of bankruptcy throughout the United States', approved July 1, 1898, and Acts amendatory thereof and supplementary thereto", approved June 7, 1934 (48 Stat. 923, 924; 11 U.S.C. § 76a, 203a, 205a), are repealed.

(d) The sentence beginning "Said section 74" in section 2 of the Act entitled "An Act to amend an Act entitled 'An Act to establish a uniform system of bankruptcy throughout the United States', approved July 1, 1898, and Acts amendatory thereof and supplementary thereto", approved June 7, 1934 (48 Stat. 924; 11 U.S.C. § 103a), is repealed.

(e) Subsection (b) of section 4 of the Act entitled "An Act to amend an Act entitled 'An Act to establish a uniform system of bankruptcy throughout the United States', approved July 1,

1898, and Acts amendatory thereof and supplementary thereto", approved June 7, 1934 (48 Stat. 924; 11 U.S.C. § 103a), is repealed.

(f) Section 2 of the Act entitled "An Act to amend an Act entitled 'An Act to establish a uniform system of bankruptcy throughout the United States', approved July 1, 1898, as amended and supplemented", approved June 5, 1936 (49 Stat. 1476; 11 U.S.C. § 93a), is repealed.

(g) Section 3 of the Act entitled "An Act to amend the Interstate Commerce Act, as amended, and for other purposes", approved April 9, 1948 (62 Stat. 167; 11 U.S.C. § 208), is repealed.

§ 402 (a) Except as otherwise provided in this title, this Act shall take effect on October 1, 1979.

(b) Except as provided in subsections (c) and (d) of this section, the amendments made by title 2 of this Act shall take effect on April 1, 1984.

(c) The amendments made by sections 210, 219, 220, 222, 224, 225, 228, 229, 235, 244, 245, 246, 249, and 251 of this Act shall take effect on October 1, 1979.

(d) The amendments made by sections 217, 218, 230, 247, 302, 314(j), 317, 327, 328, 338, and 411 of this Act shall take effect on the date of enactment of this Act.

(e) The amendments made by sections 335(a) and 336(a) of this Act shall take effect on April 1, 1984.

§ 403. (a) A case commenced under the Bankruptcy Act, and all matters and proceedings in or relating to any such case, shall be conducted and determined under such Act as if this Act had

not been enacted, and the substantive rights of parties in connection with any such bankruptcy case, matter, or proceeding shall continue to be governed by the law applicable to such case, matter, or proceeding as if the Act had not been enacted.

(b) Notwithstanding subsection (a) of this section, sections 1165, 1167, 1168, 1169, and 1171 of title 11 of the United States Code, as enacted by section 101 of this Act, apply to cases pending under section 77 of the Bankruptcy Act (11 U.S.C. & 205) on the date enactment of this Act in which the trustee has not filed a plan of reorganization.

(c) The repeal made by section 401(a) of this Act does not affect any right of a referee in bankruptcy, United States bankruptcy judge, or survivor of a referee in bankruptcy or United States bankruptcy judge to receive any annuity or other payment under the civil service retirement laws.

(d) The amendments made by section 314 of this Act do not affect the application of chapter 9, chapter 96, section 2516, section 3057, or section 3284 of title 18 of the United States Code to any act of any person—

(1) committed before October 1, 1979 or

(2) committed after October 1, 1979, in connection with a case commenced before such date.

(e) Notwithstanding subsection (a) of this section, a fee may not be charged under section 40c(2)(b) of the Bankruptcy Act in a case in which the plan is confirmed after September 30, 1978, to the extent that such fee exceeds $100,000.

§ 404. (a) The courts of bankruptcy, as defined under section 1(10) of the Bankruptcy Act, created under section 2a of the Bankruptcy Act, and exisitng on September 30, 1979, shall continue through March 31, 1984, to be the courts of bankruptcy for the purposes of this Act and the amendments made by this Act.

Each of the courts of bankruptcy so continued shall constitute a separate department of the district court that is such court of bankruptcy under the Bankruptcy Act.

(b) The term of a referee in bankruptcy who is serving on the date of enactment of this Act is extended to and expires on March 31, 1984 or when his successor takes office. During the period commencing on October 1, 1979, and ending on March 31, 1984 (hereinafter in this title referred to as "the transition period"), unless such referee is found to be not qualified by the Chief Judge of the Circuit Court after consultation with a merit screening committee established as provided in subsection (c) of this section, such a referee in bankruptcy upon the expiration of his appointed term as referee shall have the title of United States bankruptcy judge, and shall serve in the court of bankruptcy continued under subsection (a) of this section that appointed such United States bankruptcy judge, in the manner prescribed by this title. Section 8335(a) of title 5 of the United States Code shall not apply in respect of United States bankruptcy judges during the transition period.

(c) There shall be established for each State a merit screening committee composed of the president or the designee of the president of the State bar association, the dean or the designee of the dean of a law school located within the State, and the president or designee of the president of a local bar association for the area wherein a referee in bankruptcy maintains his official headquarters with the State. Each such merit screening committee shall be organized and summoned to meetings by the circuit executive for the circuit embracing the State, who shall serve as secretary of each such screening committee established within the circuit. Before the expiration of the term of a referee in bankruptcy in office on the date of enactment of this Act, or if his successor has not been appointed before the date of enactment of this Act, a

merit screening committee shall be organized by the circuit executive to pass on the qualifications of such referee for the purpose of determining whether the term of such referee shall be extended as provided under subsection (b) of this section.

(d) Except as otherwise provided in this section or in section 407 of this Act, matters relating to the office of United States bankruptcy judges and to United States bankruptcy judges shall continue to be governed during the transition period by the rules set forth in sections 34, 35, 36, 40a, 40b, 40d, 41, and 43 of the Bankruptcy Act as such Act existed on September 30, 1979. A court of bankruptcy may not appoint an individual under such sectin 34 if the merit screening committee established under subsection (c) of this section for the district of such court finds such individual to be not qualified.

(e) During the transition period, the United States bankruptcy judges of each district may appoint a clerk, necessary other employees, including law clerks and secretaries, and court reporters the same as the judges of a United States bankruptcy court established under section 201 of this Act may appoint such officers and employees under the amendment made by section 233 of this Act. Such clerk, other employees, and reporters shall have the same rights and powers, shall perform the same functions and duties and shall be subject to the same provisions of title 28 of the United States Code, as a clerk, other employee, or reporter, as the case may be, appointed under the amendment made by section 233 of this Act by a United States bankruptcy court established under section 201 of this Act. The United States bankruptcy judges of each district shall have the same rights and powers as a United States bankruptcy court established under section 201 of this Act with respect to such clerk, other employees, and reporters.

(f) During the transition period, the provisions of sections 455, 456, 569(a), 571(b), 620(b)(3), and 957(a) of title 28 of the

United States Code shall apply to United States bankruptcy judges and to any court officers or employees appointed or employed under subsection (e) of this section the same as such sections apply to the bankruptcy judges, and to any court officers or employees, of a United States bankruptcy court established under section 201 of this Act. During the transition period, the position of United States bankruptcy judge shall be deemed to be a position within the purview of subparagraph (C) of section 225(f) of the Federal Salary Act of 1967 (2 U.S.C. § 356(C)).

(g) During the transition period, the Judicial Conference of the United States may from time to time in the light of the recommendations of the judicial councils of each circuit, made after advising with the district judges and the United States bankruptcy judges of the respective circuit, and of the Director of the Administrative Office of the United States Courts, increase the number of full-time United States bankruptcy judges, or provide that a part-time United States bankruptcy judge for a particular district may serve in the capacity and receive the salary of a full-time United States bankruptcy judge, as the expeditious transaction of the business of the several courts of bankruptcy may require.

STATEMENT PURSUANT TO RULE 28.1

Petitioner Alabama Furniture Co. has no parent companies, subsidiaries or affiliates.

82-1022

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FILED
DEC 16 1982
ALEXANDER L. STEVAS,
CLERK

No. 82 -

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

ALABAMA FURNITURE CO.,

Petitioner,

v.

C. KENNETH STILL, Trustee, and
ULYSSES RIVERS, JR.,

Respondents.

MOTION FOR ACCELERATED EMERGENCY
CONSIDERATION OF PETITION FOR CERTIORARI
UNDER 28 USC §1254(1)

Petitioner Alabama Furniture Co. respectfully requests that this Court grant immediate consideration of its petition for certiorari, filed herein pursuant to 28 USC §1254(1) and Rule 18 of this Court, and in support hereof states as follows:

1. This petition presents this Court a unique opportunity to promptly settle the question, of immediate and critical importance to millions of Americans, whether all bankruptcy relief will cease and the bankruptcy system stop functioning upon release of the Court's stay of mandate in Northern Pipeline Construction Co. v. Marathon Pipe Line Co., ___ U.S. ____, 102 S.Ct. 2858 (June 28, 1982), a decision which effectively eliminated the jurisdiction of the so-called "bankruptcy courts", created throughout the country by the Bankruptcy Reform Act of 1978 ("the 1978 Act") to be the sole and exclusive means for administering bankruptcies under that Act. Many billions of dollars of lost values for debtors and creditors hang in the balance. Extraordinary delays and confusion in the lower federal and state courts are threatened. Great economic harm,

and social and legal confusion, would follow. The interest of the public, creditors and debtors, requires this Court, if possible within the scope of its settled procedures, to avoid these harms - harms which would flow not from the knowing activities of parties in the marketplace but rather from the tug-of-war among the political interests in Congress in the face of the requirements of the Constitution announced by this Court.

2. In Northern Pipeline, this Court held unconstitutional the exercise by the untenured "bankruptcy courts" of the powers and jurisdiction granted them under the 1978 Act, at least with respect to state-created claims. It also held the grant of jurisdiction to these "bankruptcy courts" to be inseverable under the 1978 Act. Thus, upon release of the stay of mandate, these "bankruptcy courts" will lack all jurisdiction and cease to function.

3. If the "bankruptcy courts" cannot function, no bankruptcies can be administered under the 1978 Act. For reasons discussed in the Petition, the district courts are disabled under that Act from assuming these functions. Without action by Congress, and lacking governing contrary authorization from this Court, no new bankruptcies will be administered and all pending bankruptcy proceedings will halt.

4. Congress has not acted nor does it appear likely to do so. Although the Northern Pipeline mandate was originally stayed until October 4, 1982, it was continued until December 24, 1982 to afford Congress ample further opportunity to redo its 1978 enactment to conform to constitutional requirements. Congress has not taken advantage of this opportunity but instead, to the best of our information, will not produce curative legislation this term or likely in the near future.

5. Neither can this Court indefinitely prolong its stay

of mandate, for to do so permits the continuance of an unconstitutional enactment and diminishes the authority of this Court's sanction both to the other branches and to the public. Thus, absent action on this petition by this Court, the immediate and disastrous consequences to the public, debtors and creditors which were remote possibilities in June will become frightening realities.

6. Petitioner suggests that this chaotic and disastrous outcome can be avoided by this Court and in this case. As set out in the Petition for Certiorari, cessation of the functioning of the "bankruptcy courts", which were created to be the sole and exclusive means for administering the 1978 Act, necessarily renders that Act invalid in its entirety because it cannot be administered. This mandates revival of the prior Bankruptcy Act, which is in fact still in effect for certain pending cases. Since there were few substantive changes in the 1978 Act from the prior Act, and the current referees (judges) were both appointed under and, with revival, will be fully empowered to administer the prior Act, the administration of bankruptcies can continue unabated and without loss and harm to the public. The potential crisis in bankruptcy administration caused by Congress' failure to act can thus be avoided.

Petitioner respectfully suggests this Court grant this

Petition, and set an expedited schedule for the resolution hereof.[1]

Respectfully submitted,

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[1] Pursuant to 28 USC §2403(a), the bankruptcy court below certified to the Attorney General that the constitutionality of an Act of Congress was drawn into question, but the Attorney General declined to intervene. The Attorney General's motion to intervene in the Sixth Circuit Court of Appeals was denied. Service hereof is nonetheless made upon the Solicitor General.

Office - Supreme Court, U.S.
FILED
DEC 23 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-1022

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ALABAMA FURNITURE CO.,
Petitioner,

vs.

C. KENNETH STILL, TRUSTEE, and ULYSSES RIVERS, JR.,
Respondents.

On Petition For A Writ Of Certiorari
To The Sixth Circuit Court of Appeals

MEMORANDUM OF RESPONDENT IN RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

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No. 82-1022

IN THE

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OCTOBER TERM, 1982

ALABAMA FURNITURE CO.,
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C. KENNETH STILL, TRUSTEE, and ULYSSES RIVERS, JR.,
Respondents.

On Petition For A Writ Of Certiorari
To The Sixth Circuit Court of Appeals

MEMORANDUM OF RESPONDENT IN RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

For purposes of this Memorandum, Respondent accepts the material in the Petition for a Writ of Certiorari included under the headings, "Jurisdiction" and "Opinion Below".

STATEMENT

The Respondent, C. Kenneth Still, Trustee, accepts the STATEMENT of Petitioner only to the extent that this "case", as opposed to the Petition, "presents an issue of exceptional public importance and urgency." (Pet. 1). However, that Respondent agrees with the importance and urgency of a determination being made whether or not this country's bankruptcy system effectively functions after release of the mandate in *Northern Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, ___ U.S. ___, 102 S. Ct. 2858 (1982), on December 24, 1982, does

not place Respondent in agreement with Petitioner that the questions presented for review and positions advanced in the Petition properly represent the real issues the Court must consider in this case. The issues framed by Petitioner, supposedly motivated by its desire to prevent "[e]conomic chaos" and "[l]egal confusion", (Pet. 2), effectively would place this Court in the position of repealing the work of Congress that culminated in the enactment of the Bankruptcy Reform Act of 1978 and supplanting that statute with the Bankruptcy Act of 1898 (repealed by the 1978 Act) in direct contradiction with everything intended by the Congress by its enactment of the Bankruptcy Reform Act of 1978. The suggestion to "scrap" the 1978 Act seems more the product of Petitioner's own post-*Northern Pipeline* confusion than it is a contribution to effective bankruptcy administration.

Respondent takes strong exception with the representation made by Petitioner that the Bankruptcy Reform Act of 1978 "made a few substantive changes." (Pet. 2). Numerous substantive changes of enormous importance to the bankruptcy system have been incorporated into the 1978 Act. Furthermore, those changes are in addition to and totally and completely independent of the nature, structure and composition of the court of bankruptcy. A few examples illustrate this point.

The Bankruptcy Reform Act of 1978 represents the first comprehensive and unified statement by Congress on all aspects of the subject of bankruptcy. Prior thereto, the subject of bankruptcy emerged over a period of time through a hodgepodge of statutory law, case law and rules of procedure. *See, e.g.*, 11 U.S.C. §§1 *et seq.* (repealed by Pub. L. No. 95-598, §401[a]); and 28 U.S.C. §2075 (Which, prior to its amendment by Pub. L. No. 95-598, §247, provided that all laws in conflict with the rules promulgated under that section were of no force or effect). Yet, this pre-1978 hodgepodge is offered by Petitioner as an acceptable alternative. Petitioner also implies

that, had Congress been told that the 1978 Act was invalid in whole or in part, it would have replaced that Act with the 1898 Act rather than elect any other legislative course of action.[1]

Provision for a United States trustee is an excellent example of a new substantive development incorporated into the 1978 Act. 11 U.S.C. §§1501 *et seq.* The pilot program for U.S. trustees "adds a role for a government official to supervise bankruptcy administration, and to fill the vacuum of lack of creditor participation, where necessary to assure fair and efficient administration." H. Rep. at 100.

The elimination of the different types of business reorganizations and their consolidation into one, simplified chapter is a significant change from pre-1978 bankruptcy law. 11 U.S.C. §1101 *et seq.* and H. Rep. at 220-261.

Individual debtor relief under Chapter XIII of the 1898 Act was available only to "an individual whose principal income is derived from wages, salary or commissions." 11 U.S.C. §1006(8) (repealed effective 1979). Under chapter 13 of the 1978 Act, any individual "whose income is sufficiently stable and

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[1] The 1978 Act had the broader and more general purpose of restating the whole area of bankruptcy law, not just the court system.

> The major purpose of this bill is the modernization of the bankruptcy laws. The substantive law of bankruptcy and the current bankruptcy system was designed in 1898, in the horse and buggy era of consumer and commercial credit, and was last overhauled in 1938, nearly 40 years ago. It has only been since 1938 that the consumer credit industry has grown; and it has only been since the widespread adoption of the Uniform Commercial Code in the early 1960's that commercial credit has grown to its present magnitude. As the issue of bankruptcy has fallen from the national consciousness since the Great Depression in the 1930's, the bankruptcy system has fallen into disrepair.

H. R. Rep. No. 95-595, 95th Cong., 1st Sess. 3-4 (1977) (footnotes omitted) (hereinafter cited as "H. Rep.")

regular to enable such individual to make payments under a plan" may obtain relief thereunder. 11 U.S.C. §101(24). Under chapter 13 there is the additional broader protection of an automatic codebtor stay. 11 U.S.C. §1301.

Special provision also is made in the 1978 Act for the liquidation of commodity brokers; this did not exist under the 1898 Act. 11 U.S.C. §761-66.

A change of general application is the giving to creditors of a statutory right to adequate protection of their interests in property which otherwise might be affected by the commencement of a case and the specification of methods for obtaining such adequate protection. 11 U.S.C. §§361 and 363. A comprehensive and unified system of federal exemptions was also created. 11 U.S.C. §522(d).[2]

This Court must look with skepticism at any argument based upon the contention that the Bankruptcy Reform Act of 1978 made few substantive changes in bankruptcy law. (Pet. 2, 8.)

This Court is being asked to certify the record of and to review this matter because of certain "Questions Presented" by Petitioner. Those questions have nothing to do with the matter *sub judice* but reflect Petitioner's desire to capitalize on Congress' failure to respond to this Court's pronouncement in *Northern Pipeline Construction Company* v. *Marathon Pipe Line Company*, ____ U.S. ____, 102 S.Ct. 2858 (1982), "that the broad grant of jurisdiction to the bankruptcy courts contained in §241(a) [of the Bankruptcy Reform Act of 1978] is un-

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[2] Worthy of notation are the switch in concept and effect from "secured creditors" to "secured claims", 11 U.S.C. §506(a), the expanded and clarified definition of property of the estate, 11 U.S.C. §541, the avoiding powers given to individuals by 11 U.S.C. §522(f) (the subject of the Court's decision in the *United States* v. *Security Industrial Bank*, ____ U.S. ____, ____ S.Ct. ____ [1982]), and the waiver of sovereign immunity in 11 U.S.C. §106.

constitutional . . . [and that] Congress [by this Court's stay of its mandate herein, was given] an opportunity to reconstitute the bankruptcy courts or to adopt other valid means of adjudication, without impairing the interim administration of the bankruptcy laws". 102 S. Ct. at 2880. For this reason, and the further reasons hereinafter set forth, Respondent respectfully urges this Court to reject the relief requested by Petitioner but to grant the relief requested herein by Respondent.

PROCEEDINGS BELOW

Petitioner has prevailed in the bankruptcy court by having the debtor's voluntary petition for relief dismissed. As a consequence, the value of the security interest held by Petitioner remains exactly as provided by contract. After such dismissal, there is no automatic stay and Petitioner is free to pursue any and all remedies it has against the debtor.

After the dismissal of Respondent's petition, Petitioner moved the bankruptcy court to rescind its order of dismissal and rule that Respondent's petition should be dealt with pursuant to the provisions of the Bankruptcy Act of 1898. The bankruptcy court denied Petitioner's motion which Petitioner then appealed, seeking "relief" in the appellate courts.

ANALYSIS

Petitioner asks this Court to issue its writ in the instant matter "[b]ecause the 1978 Bankruptcy Act is an integrated enactment and cannot be administered apart from its unconstitutional court provisions, [and that] the 1978 Act as a whole falls and the prior Bankruptcy Act revives to govern bankruptcies until further action by Congress." (Pet. 7). The issue that petitioner raises is that this Court ruled or the effect of this Court's ruling in *Northern Pipeline* was that because of Congress' failure to act there does not exist a court capable of applying the *corpus juris* of bankruptcy. Petitioner's argument is utterly erroneous.

This position ignores both the substance and structure of Public Law No. 95-598 as well as the relationship between that law and other federal statutes.

Public Law No. 95-598 admittedly is a comprehensive, "integrated" legislative effort intended to modernize and codify the national law of bankruptcy; but this legislation accomplishes its intended purpose through four separate titles each of which deals with the subject matter therein independent of the subject matter and treatment in the remaining titles. The provisions of title I of the Public Law are the *corpus juris* of bankruptcy; title II contains amendments to title 28 of the United States Code; title III contains amendments made to other federal statutes to conform them to the amendments made in titles I and II; and title IV contains provisions governing the effectiveness of the provisions in the other titles during the period November 6, 1978 - March 31, 1984, and the applicability of other federal law. The provisions of the four titles may be a part of a single effort to deal with a subject matter that appears to be generally singular, but this is not synonymous with interdependence and inseverability as petitioner imports. *Pari materia* is intended to facilitate statutory construction, not to be determinative of constitutionality.

In order for petitioner's thesis to obtain, one of the following must have been abrogated by this Court's judgment in *Northern Pipeline:* (1) a component of the government of the United States with the capability of exercising the judicial function; (2) the capability of any such component to hear and to adjudicate the subject matter of bankruptcy; or, (3) the *corpus juris* of bankruptcy. There is nothing in that decision that suggests that there does not exist a component of the government of the United States capable of applying the *corpus juris.* All that this Court dealt with in that case was the capability of a particular judicial officer to hear and to decide a particular type of matter.

Since the entry by this Court of its judgment in *Northern Pipeline,* there have been many opinions and observations made as to the intent, meaning and breadth of the judgment. The differences between those positions have to do with exactly what limitations exist upon the capability of sitting bankruptcy judges to hear and adjudicate bankruptcy matters. But that is not of consequence in the matter *sub judice.* Such disagreement has nothing to do with whether or not there exists a component of the government of the United States which has the capability of applying a *corpus juris* of bankruptcy.

The Bankruptcy Reform Act of 1978 did create a component of the government of the United States to hear and adjudicate bankruptcy matters. *See* 28 U.S.C. §151 *et seq.* (as enacted by Pub. L. No. 95-598, §201). However, that tribunal was and is not to come into existence until April 1, 1984. Pub. L. No. 95-598, §402(b). Until that time, *viz.*, the time between the effective date of the Bankruptcy Reform Act and April 1, 1984 (the "transition period", Pub. L. No. 95-958, §404[b]), the component of the government of the United States that was in existence at the beginning of that transition period was to be continued.[3] There is nothing in this Court's judgment in *Northern Pipeline* that suggests that the existence of the "continued" court has been compromised or jeopardized. Moreover, the existence of that court does not depend upon the Bankruptcy Reform Act of 1978, or anything in it.

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[3] The courts of bankruptcy, as defined under section 1(10) of the [former] Bankruptcy Act, and existing on September 30, 1979, shall continue through March 31, 1984, to be the courts of bankruptcy for the purposes of this Act and the amendments made by this Act. Each of the courts of bankruptcy so continued shall constitute a separate department of the district court that is such court of bankruptcy under the [former] Bankruptcy Act.

Pub. L. No. 95-598, §404(a).

That such "continued" court has the capability to hear and adjudicate bankruptcy matters also is not dependent upon the Bankruptcy Reform Act of 1978. The "continued" court has that capability because of other federal law which either invests that court with bankruptcy jurisdiction or recognizes such a capability independent both from the Bankruptcy Reform Act of 1978 and anything in it and from the limitations of this Court's judgment in *Northern Pipeline*.

The "court of bankruptcy" referred to in Pub. L. No. 95-598, §404(a) is the United States District Court, brought into existence by 28 U.S.C. §132. The district court is the "court of bankruptcy" not because of anything in the (former) Bankruptcy Act or Pub. L. No. 95-598, §404(a), but because another federal statute invests the district court with the capability to hear and adjudicate bankruptcy matters, 28 U.S.C. §1334.[4] This also must be so since all of the provisions of Pub. L. No. 95-598 that otherwise might accomplish such an investiture do not become effective until April 1, 1984. *See*, Pub. L. No. 95-598, §§402(b) and (c). During the transition period, 28 U.S.C. §1334 remains operative and must be read in connection with the provisions of Pub. L. No. 95-598 that do apply during that period, *viz.*, Pub. L. No. 95-598, §404 *et seq.*

The label "court of bankruptcy" identifies the district court by one facet of its subject-matter jurisdiction. It is no more significant than the identification of the district court as the "court of admiralty". It is not that the "court of bankruptcy", as contemplated and referred to in §404(a) is *eo ipso* "created" thereby; it is that the district court can be identified through the use of a label referring to one of the subject matters within that court's jurisdiction.

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[4] "The district courts shall have original jurisdiction, exclusive of the courts of the States, of all matters and proceedings in bankruptcy."

That phrase "court of bankruptcy" is a label of historical curiosity, not of judicial significance. As Collier describes it:

> The expression "courts of bankruptcy" occurred first in the Bankruptcy Act of 1867. Its framers obviously borrowed the notion from England, where the bankruptcy law at that time was administered by a separate and distinct judicial organization under the name "Court of Bankruptcy". Accordingly, the view was advanced that American law used the term in the same sense and that, *despite the Act's failure to create a new organization,* "the District Court, when acting as a court of bankruptcy, is none the less a separate and distinct court, and exercising powers and jurisdiction separate and distinct from its powers and jurisdiction as District Court, than it were such separate and distinct organization."

1 Collier on Bankruptcy (14th ed.) ¶ 1.10, pp. 73-74 (footnotes omitted) (emphasis added).

Respondent has demonstrated that the Bankruptcy Reform Act of 1978, other provisions of federal law contained in title 28 and this Court's judgment in *Northern Pipeline* do not abrogate the existence of a court with bankruptcy jurisdiction. Next, Respondent will describe the character of the district court's bankruptcy jurisdiction.

The subject matter of bankruptcy jurisdiction, *i.e.*, its character, can be described in terms of the sources of law which serve as the bases for causes of action, in terms of the relationship between different types of causes of action *inter sese*, in terms of who may be a party to a cause of action, in terms of relief sought, etc. In other words, the character of bankruptcy jurisdiction can be described in as many ways as can any other facet of juridical activity. In the Bankruptcy Reform Act of 1978, Congress chose to describe bankruptcy jurisdiction as encompassing the following: (1) "cases under title 11", (2) "civil proceedings arising under title 11", (3) "civil proceedings arising in cases under title 11", and (4) "civil proceedings related to cases under title 11". This is the taxonomy of 28 U.S.C. §1471.

The same compass of subject-matter jurisdiction also can be described in terms that would include "federal question", "diversity", "ancillary" and "pendent" jurisdiction.[5] In other words, what Congress did when it expressed bankruptcy jurisdiction in the terms it chose and included in 28 U.S.C. §1471 was to state that jurisdiction in terms of and with reference to the *corpus juris* of bankruptcy, *i.e.*, title 11 of the United States Code. But the Bankruptcy Reform Act did not, except to the extent that a matter could arise only because of the existence of title 11, create that which is the character of bankruptcy jurisdiction. That character already existed and had been identifiable because of other sources of law.

That Congress intended bankruptcy courts as constituted pursuant to the provisions of the Bankruptcy Reform Act to administer the provisions of the Act is, as Petitioner asserts, correct. But, as Respondent has demonstrated, that proposition does not lead to the conclusions that if such courts cannot administer the law as so intended (because of this Court's judgment in *Northern Pipeline*), the law in its entirety must fall or that another court does not have the capability to so act. Petitioner disregards the context of bankruptcy within the federal juridical and jurisprudential constellation and fails to understand the character of bankruptcy jurisdiction.

In the second question presented by Petitioner for review, this Court is being asked to rule that the former Bankruptcy Act of 1898, as amended, has been revived by implication from this Court's judgment in *Northern Pipeline* and that that revived 1898 Act must govern the proceedings in this and all other bankruptcy cases. In its use of the term "revived", Petitioner acknowledges that the 1898 Act was repealed by Pub. L. No. 95-598, §401(a).

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[5] See, for example, *Edelman* v. *Jordan*, 415 U.S. 651, 94 S. Ct. 1347 (1974); *United Mine Workers* v. *Gibbs*, 383 U.S. 715 86 S. Ct. (1966); *Moore* v. *New York Cotton Exchange*, 270 U.S. 593, 46 S. Ct. 367 (1926); *Dewey* v. *West Fairmont Gas Coal Co.*, 123 U.S. 329, 8 S. Ct. 148 (1887). See, also, 28 U.S.C. §§1331 and 1332.

To revive the 1898 Act would require that the Act of Congress which repealed it, *i.e.*, Pub. L. No. 95-598, §401(a), has itself been vitiated. Congress has not so acted and in the absence of such Congressional action the only other way in which that repealer could have been vitiated is by a judicial determination that the repealer is unconstitutional. *Frost* v. *Corporation Commission*, 278 U.S. 515 (1929). Petitioner suggests this to have occurred as a result of this Court's decision in *Northern Pipeline*.

It seems almost too elementary to observe that nothing stated by this Court in *Northern Pipeline* in any way dealt with, limited or questioned the constitutional power of Congress to repeal the 1898 Act or that this Court vitiated Pub. L. No. 95-598, §401(a). Consequently, Petitioner's position must be based upon its divining such an implicated result from the import of the judgment in *Northern Pipeline*. Such an implication not only is inconsistent with the nature of this Court's treatment of the issues presented to it in *Northern Pipeline* but it is at odds with this Court's purposeful avoidance of any rendering of the provisions *ipso facto* of the Bankruptcy Reform Act (except, of course, for its application of the doctrine of separation of powers).

Respondent will not presume to tell this Court what the intent and meaning of its mandate was in *Northern Pipeline*. It is more than sufficient to quote the following from the plurality opinion:

> Having concluded that the broad grant of jurisdiction to the bankruptcy courts contained in §241(a) is unconstitutional, we must now determine whether our holding should be applied retroactive to the effective date of the Act.

102 S.Ct. 2880.

CONCLUSION

Notwithstanding the dismissal of Respondent's petition by the bankruptcy court below, Petitioner now seeks to bring this matter before this Court for purposes having nothing to do with that dismissal. Respondent urges this Court to dispose of the Petition by making it clear that the relief Petitioner seeks is inappropriate and not in consonance with this Court's judgment in *Northern Pipeline*. More specifically, Respondent suggests that this Court opine that title 11 of the United States Code, as enacted by Pub. L. No. 95-598, in the *corpus juris* of bankruptcy and that the United States district courts have the jurisdiction to hear and to adjudicate all bankruptcy and bankruptcy-related matters pursuant to 28 U.S.C. §§1471(a) and (b), as enacted by Pub. L. No. 95-598, or 28 U.S.C. §1334 and the doctrines of pendent and ancillary jurisdiction.

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NO. 82-1022

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

Supreme Court, U.S.
FILED
DEC 30 1982
ALEXANDER L. STEVAS
CLERK

ALABAMA FURNITURE CO.,

Petitioner

vs.

C. KENNETH STILL, Trustee,
and ULYSSES RIVERS, JR.,

Respondents

RESPONSE OF DEBTOR, ULYSSES RIVERS, JR.

Comes ULYSSES RIVERS, JR., by his attorney, and would respectfully show unto this Honorable Court that he waives his right to brief and argue in this cause. Debtor would show that all issues have heretofore been presented to this Honorable Court by Alabama Furniture Company and C. Kenneth Still, Trustee.

Respectfully submitted,

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PROOF OF SERVICE

I, S. RICHARD HOLCOMB, counsel of record for ULYSSES RIVERS, JR., and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 29th day of December, 1982, I served one copy of Response of Debtor, Ulysses Rivers, Jr., on each of the several parties thereto, as follows, by mailing the same in a duly addressed envelope with first-class postage prepaid:

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It is further certified that all parties required to be served have been served, and that the list of such parties is as set forth above.

S. RICHARD HOLCOMB
Attorney for Debtor, ULYSSES RIVERS, JR.

Supreme Court, U.S.
FILED
JAN 4 1983
ALEXANDER L. STEVAS
CLERK

No. 82-1022

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ALABAMA FURNITURE CO.,
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v.

C. KENNETH STILL, Trustee, and ULYSSES RIVERS, JR.,
Respondents.

On Petition for a Writ of Certiorari to the Sixth Circuit Court of Appeals

---

CONSUMER BANKERS ASSOCIATION, AND CREDIT UNION NATIONAL ASSOCIATION, INC., FOR LEAVE TO FILE BRIEF AS AMICI CURIAE, AND BRIEF OF AMICI CURIAE

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IN THE

Supreme Court of the United States

No. 82-1022

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Petitioner,

v.

C. KENNETH STILL, Trustee, and ULYSSES RIVERS, JR.,
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On Petition for a Writ of Certiorari to the Sixth Circuit Court of Appeals

---

MOTION OF THE CONSUMER BANKERS ASSOCIATION, AND CREDIT UNION NATIONAL ASSOCIATION, INC., FOR LEAVE TO FILE BRIEF AS AMICI CURIAE

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The Consumer Bankers Association, and Credit Union National Association, Inc., respectfully move, pursuant to Rule 36 of the Rules of this Court, for leave to file the attached brief as *amici curiae*. Respondent C. Kenneth Still has consented to the filing of such brief, and is in the process of preparing written consent. Respondent Ulysses Rivers, Jr., and the Petitioner have not, as yet, replied to our requests for consent. When written consents are received, they shall be promptly filed.

Movants are associations representing banks and credit unions whose members extend substantial amounts of consumer credit. The Petition for a Writ of Certiorari in this case raises substantial issues about the continued

operation of the federal bankruptcy laws. It thus directly affects movants, whose members have been and expect to be claimants in bankruptcy cases.

One or more of the movants have served as *amicus curiae* in other recent cases before this Court, *viz.*:

Fidelity Federal Savings and Loan Association v. de la Cuesta, —— S.Ct. —— (1982)

Ford Motor Credit Co. v. Cenance, 101 S.Ct. 2239 (1981)

Ford Motor Credit Co. v. Milhollin, 444 U.S. 555 (1980)

Marquette National Bank v. First of Omaha Service Corporation, 439 U.S. 299 (1978)

WHEREFORE, it is respectfully requested that the Court grant movants leave to file the attached brief as *amici curiae* in this case.

Respectfully submitted,

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IN THE

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---

BRIEF OF THE CONSUMER BANKERS ASSOCIATION, AND CREDIT UNION NATIONAL ASSOCIATION, INC., AS AMICI CURIAE

STATEMENT OF THE CASE

In the court below the bankruptcy petition of a consumer debtor was summarily dismissed on the ground that the "bankruptcy court" system created by the Bankruptcy Reform Act of 1978 violated Article III of the United States Constitution. The court below also refused to permit the case to continue under the prior Bankruptcy Act of 1898.

In this posture, the case brings to the Court, in direct and graphic form, the question whether—and how—the

federal bankruptcy system shall continue to function until such time as the Congress of the United States enacts legislation to restructure the machinery for bankruptcy administration consistent with this Court's mandate in *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 102 S.Ct. 2858 (1982). By denying the Solicitor General's application for a further stay of judgment in *Northern Pipeline*, the Court has released its mandate that the system of bankruptcy courts, as constituted under the Bankruptcy Reform Act of 1978 (the "1978 Reform Act") is unconstitutional. This seems unequivocally to mean that the bankruptcy laws cannot be administered through the court system designed by Congress in 1978. Congress has not enacted corrective legislation, and the bankruptcy system faces virtual anarchy.

The Court's holding in *Northern Pipeline* clearly contemplated that curative action would be taken by Congress to reconstruct the bankruptcy courts in a fashion consistent with constitutional dictates. It was for this reason only—to permit legislative correction "without impairing the interim administration of the bankruptcy laws"—that this Court stayed its judgment, first until October 4, 1982, and then by extension to December 24, 1982. Nothing in the Court's opinion in *Northern Pipeline* expressly addresses the consequences of Congress' failure to act. The Court, the parties to this litigation, and the nation therefore confront an extraordinary circumstance, where the continued administration of the bankruptcy laws is cast seriously in doubt.

The repercussions from a shut-down of the bankruptcy system will be vast, probably incalculable in dollar terms, and will be accompanied by the risk of irremediable injury to creditors, debtors and others, for whom the suspension of bankruptcy protections may mean financial disaster or human misery. State law machinery to assure orderly liquidation of debtors' estates simply does not exist on any scale that could substitute for the federal

bankruptcy system. While the leaders of both Houses of Congress have indicated their intent to place bankruptcy legislation high on the agenda in the 98th Congress,[1] there is no assurance that corrective legislation will be enacted soon, or indeed ever.

The case before the Court suggests two extreme scenarios. One is reflected in the rulings of the Bankruptcy Judge in the court below and is to the effect that, for lack of a constitutional court, no bankruptcy case can be administered under the 1978 Reform Act; if this holding is affirmed, presumably any bankruptcy cases pending or filed after the release of the stay in *Northern Pipeline* would be subject to peremptory dismissal. Another view is that urged by the Petitioner, namely that the constitutional flaw in the 1978 Reform Act so permeates the law that it must fall in its entirety, with the result that the earlier Bankruptcy Act of 1898 (repealed in 1978) revives; under this view, bankruptcy cases may proceed but would be governed both substantively and procedurally by the older law. For reasons detailed below, *Amici* concur with Petitioner that the case merits this Court's issuance of a writ of certiorari. But *Amici* submit that neither of the alternative dispositions just noted is appropriate or legally compelled. By its disposition of this case in any manner—whether by denial of the writ, or on the merits—this Court will send a strong and clear signal to the lower courts and to the public on a simple but compelling question: How, if at all, will the nation's bankruptcy system continue to function during the time before Congress legislatively cures the constitutional flaws in the 1978 Reform Act?

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[1] The correspondence between the Acting Attorney General and congressional leaders was appended to the Application For A Further Stay of Judgment in the case of *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, submitted by the Solicitor General on December 22, 1982.

INTERESTS OF AMICI CURIAE

The Consumer Bankers Association (CBA) is a non-profit organization organized in 1919 to provide a voice for the retail banking industry. Since that time, the membership of CBA has grown to 500 commercial banks, of all sizes, which are actively engaged in extending consumer credit. Combined, the members of CBA hold over 70 percent of all consumer credit outstanding held by commercial banks.

The Credit Union National Association, Inc. (CUNA), is a non-profit membership association that represents the interests of 10,765 federally chartered and 7,780 state chartered credit unions through 52 state and area credit union leagues. The combined total of outstanding consumer loans at credit unions was $50.9 billion as of October 30, 1982.

Although *Amici* are not parties in this case, its resolution will unavoidably affect them in a number of ways, direct and indirect. Members of CBA and CUNA have had numerous consumer obligors seek relief from their debts under the 1978 Reform Act; each expects that additional consumer obligors will do so in the future. Each is therefore vitally interested both in the content of the bankruptcy laws and in the manner of their administration.

There is widespread agreement, supported by data, that the 1978 Reform Act measurably increased the protections for consumer debtors in bankruptcy and has contributed to the unprecedented rise in the number of bankruptcies. Hearings on Bankruptcy Reform Act of 1978, Subcommittee on Courts, Senate Committee on the Judiciary, 97th Cong., 1st Sess. (April 3, 6; October 29, 1981); Consumer Bankruptcy Study, Credit Research Center, Purdue Univ. (1982). Superficially, therefore, it would seem that creditors such as *Amici* would benefit from a suspension of all bankruptcy proceedings, or from a return to the halcyon rules of the Bankruptcy Act of

1898. It is true that, without the constraints of the 1978 Reform Act, creditors may be able to reduce credit losses by seeking collection remedies that would be denied them under that Act.

Amici do not view their long-term interests so narrowly, nor do we believe that the economic activity of the nation as a whole is well-served by an interregnum of bankruptcy cessation, chaos, or regression. Among the considerations that prompt *Amici* to urge the retention, in some administrable form, of the substantive corpus of the 1978 bankruptcy reform law are the following:

1. The 1978 Reform Act was a broad-sweeping reform of both the substantive law of bankruptcy and the procedures for administration of that law. As a consensus reform, its legitimate and constitutional aspects (which benefit creditors and debtors alike) should not be suspended or nullified.

2. *Amici* will be participating in the political processes of Congress in designing a constitutional bankruptcy court structure. As was the case in the 97th Congress, it is likely that *Amici*, and other consumer credit grantors. will also be urging Congress to make substantive amendments to the 1978 Reform Act to balance more fairly the positions of creditors and consumer debtors. We believe these amendments would more properly be grafted onto the stem of a viable 1978 Reform Act than considered in a setting of bankruptcy chaos.

3. Total suspension of the 1978 Reform Act, or revival of the Bankruptcy Law of 1898, would require creditors to overhaul or adjust their credit granting and collection practices during the interim period before Congress acts to cure the constitutional flaw in the 1978 law. This revision of procedures, and a further revision to adjust to a new regime when Congress does act, would involve confusion, inefficiency and operational burdens.

4. If the administration of the bankruptcy laws is completely suspended, there will be no mechanism to assure

the fair and equitable distribution of debtors' estates. Predatory practices among creditors may appear, practices that visit intolerable hardships on individual debtors and that disadvantage those creditors who seek to deal with their customers in a responsible and sympathetic manner. Likewise, a revival of the Bankruptcy Act of 1898 may encourage a revival of some of the unsavory practices permitted by that law, practices which the Congress and the industry had meant to relegate to history.

SUMMARY OF ARGUMENT

Amici submit that this Court's judgment in *Northern Pipeline* may and should be interpreted to permit the continued administration of the substantive corpus of the 1978 Reform Act, under the jurisdictional aegis of the district courts. The constitutional flaw in the 1978 Reform Act requires excision only of the "bankruptcy courts" as such, and does not preclude the exercise of residual jurisdiction by the district courts. Any other result would thoroughly frustrate the intentions of Congress and the expectations of this Court in *Northern Pipeline*.

Amici therefore urge this Court to reverse the order of dismissal in this case, and to remand it with instructions that the court shall proceed pursuant to rules which assure that the substantive provisions of the 1978 Reform Act are applied and that any matters requiring determination by an Article III court may be determined by the district court.

This disposition would avoid a finding either that the bankruptcy laws are wholly suspended until Congress acts, or that the expressly-repealed 1898 law is resurrected. It would provide a manner of systematic bankruptcy administration, albeit an imperfect one. The obvious cumbersomeness of district court supervision should continue to provide Congress with strong reasons for expeditious legislative cure.

ARGUMENT

I. THE EXTRAORDINARY CIRCUMSTANCE OF A FAILURE OF CONGRESS TO CORRECT CONSTITUTIONAL DEFECTS IN THE BANKRUPTCY COURT SYSTEM IS CREATING VAST CONFUSION AND UNCERTAINTIES IN THE ADMINISTRATION OF THE BANKRUPTCY LAWS, WHICH JUSTIFIES THE EARLIEST POSSIBLE ACTION BY THIS COURT TO AFFIRM THAT BANKRUPTCY ADJUDICATIONS MAY CONTINUE.

Amici are in full agreement with Petitioner that "this case presents an issue of exceptional public importance and urgency." With the release of the stay of mandate in *Northern Pipeline* on December 24, 1982, and without corrective legislation from Congress, all sense of certainty has disappeared from the administration of the bankruptcy laws.

The immediate consequences are already appearing. Neither creditors nor debtors are confident whether the "bankruptcy courts," or the district courts, have jurisdiction over bankruptcy cases or parts of such cases. Parties to cases before "bankruptcy judges" are seeking confirmation of every decision by the district court. It is probable, although there is no way to verify, that some debtors have refrained from filing bankruptcy petitions, or creditors have refrained from seeking relief or protections under the bankruptcy laws, because of the prospects of delay and expense in litigating jurisdictional issues.

At the suggestion of the Judicial Conference of the United States, most district courts have adopted interim rules to permit the continued handling of bankruptcy matters after December 24, 1982. These rules are certain to invite challenge, thus adding a whole new layer of litigable threshold issues. Such challenges may—in fact almost assuredly will—produce rulings by lower courts throughout the country on the constitutional adequacy of those interim rules. But it will be months, at

a minimum, before such a case will be ripe for review by this Court.

With Congress currently in adjournment, and with the many organizational matters that will necessarily occupy its attention when it reconvenes, there is also little likelihood that Congress will enact curative legislation soon.

Thus the nation confronts a situation that is unprecedented in this century: there is no clearly valid federal bankruptcy system, and no firm date for any judicial or legislative cure. This situation, we submit, presents a compelling need for this Court's intervention, through the vehicle of the pending case.

This case was initially decided by the bankruptcy judge prior to this Court's decision in *Northern Pipeline*. The judge's order of dismissal was stayed pending appeal, and proceedings in the Court of Appeals were stayed so that the Petition for a Writ of Certiorari could be submitted to this Court. Although not originally subject to the dilemma that now faces the bankruptcy system, this case must in any event be returned to the courts below for disposition of their stays. At that point this litigation is indistinguishable from cases filed after December 24, 1982, and would be subject to the interim rules adopted by the district courts on the recommendation of the Judicial Conference. We therefore submit that the present status of the bankruptcy laws is fully justiciable in this case.

II. A SIMPLE AFFIRMANCE OF THE DISMISSAL BELOW, OR A REVIVAL OF THE 1898 BANKRUPTCY ACT, WOULD PROFOUNDLY AND UTTERLY FRUSTRATE THE INTENT OF CONGRESS IN ENACTING THE 1978 REFORM ACT AND THIS COURT'S JUDGMENT IN *NORTHERN PIPELINE*.

The enactment of the 1978 Reform Act concluded a decade of comprehensive scholarly and legislative review of the weaknesses of the old Bankruptcy Act of 1898. The

entire movement was toward "reform" and modernization, both of the substantive corpus of bankruptcy law (Title 11 of the United States Code) and of the judicial and administrative machinery by which that corpus is implemented. The entire expectation of the Congress, manifest throughout the legislative history and debates, was that the bankruptcy laws would be continued in an improved and streamlined manner.

It simply confounds common sense and reality now to posit that because Congress unsuccessfully implemented part of its goal (the bankruptcy court system) the entire reform effort must be reshaped into either a suspension of all bankruptcy administrations or the regressive reinstitution of the rules of the 1898 Act. No outcomes could more egregiously pervert the overall intention, purpose and effect of the 1978 Reform Act.

Neither is there any basis for concluding that in the aftermath of *Northern Pipeline* Congress now prefers to see the bankruptcy system grind to a halt, or revert to the law of 1898. Since June 28, 1982 and prior to the expiration of the stay, both Houses of Congress invested considerable effort in attempts to solve the constitutional problem of bankruptcy procedure. The inability to legislate a cure is attributable to constraints of time, to "politics," and to disagreement over the *manner* in which the bankruptcy courts should be restructured. Legislative leaders have indicated their intention to continue the quest for a solution in the next Congress. Nowhere in all of this is the slightest support for a view that Congress meant the 1978 Reform Act to self-destruct.

Outside of Congress, the supervisory body for the federal courts concluded that the bankruptcy system could continue to function even if Congress did not act. The Administrative Office of the United States Courts, in memoranda circulated to the federal courts on September 27 and December 3, 1982, reported a resolution of the Judicial Conference of the United States which concluded

that *Northern Pipeline* "does not cause a jurisdictional lapse." To follow through on this conclusion, the Administrative Office recommended an interim Rule for the district courts, whereby bankruptcy cases could still be administered if (as has now happened) Congress did not act. That interim Rule calls for the district courts to supervise a careful allocation of bankruptcy administration between district court and bankruptcy judges to assure that constitutional requirements are met.[2]

The Court's judgment in *Northern Pipeline* does not contain any mandate for bankruptcy system collapse. The principles of separation of powers suggest that a judicial declaration of statutory invalidity should range no further than the Constitution compels. Thus, if a statute can be construed as constitutional the Court has generally indulged the permissible interpretation instead of the invalid one. The Court has preferred to settle statutory interpretation questions on non-constitutional grounds wherever possible. See, *e.g.*, *United States* v. *Security Industrial Bank*, 51 U.S.L.W. 3420 (U.S. Nov. 30, 1982). And when parts of a statute infringe the Constitution, the Court has generally sought the least intrusive sanction or remedy so as not to disrupt the legitimate prerogatives of the legislative branch. *Buckley* v. *Valeo*, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976).

This approach permeates the judgment in *Northern Pipeline*. Three Justices, in dissent, would have resolved doubts altogether in favor of the constitutionality of the bankruptcy court provisions of the 1978 Reform Act.

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[2] As early as September 10, 1982, the Judicial Conference of the United States advised Congress of its belief that *Northern Pipeline* "did not completely invalidate subsections (a) and (b) of section 1471 of the 1978 Act." Memorandum of Administrative Office of the United States Courts, December 3, 1982. Congress must also have been aware of the interim Rules promulgated in September and December. Congress thus had opportunity to express objection to the interim procedures suggested by the Judicial Conference, but to our knowledge has not done so in any manner.

Two other Justices, concurring, would have preferred that the Court's holding were limited to the narrow facts of the case. Even the plurality, which felt compelled to find that the bankruptcy court provisions of the 1978 Reform Act were constitutionally flawed, was reluctant to substitute its own impressions for Congress' intent. This reluctance ultimately led the Court to stay its judgment so that Congress' desires could be enacted.

Moreover, at the very outset of its opinion, after noting that the 1978 Reform Act made changes "in both the substantive and procedural law of bankruptcy," the plurality then observed: "It is the changes in the latter that are at issue in this case." 102 S.Ct. at 2862. This seems clearly to acknowledge that the corpus of the 1978 bankruptcy law is unaffected by the Court's holding. It would be anomalous in the extreme if the effect of the Court's judgment, lacking congressional cure, is to leave that corpus of bankruptcy law suspended, unmoored, incapable of application. It would be even more startling if those substantive portions of the 1978 Reform Act, left untouched by the *Northern Pipeline* judgment, were now found to be replaced by the once-dead rules of the 1898 law.

We therefore submit that the outcomes proposed by the Petitioner, or implied in the lower court's orders in this case, diverge fundamentally from any plausible expectation by Congress or this Court.

III. NEITHER THE 1978 REFORM ACT, NOR THIS COURT'S JUDGMENT IN *NORTHERN PIPELINE*, PRECLUDE THE CONTINUED ADMINISTRATION OF THAT ACT BY THE DISTRICT COURTS.

A. The holding in *Northern Pipeline* does not operate to revive the Bankruptcy Act of 1898.

The Petitioner sees a syllogism in the Court's judgment in *Northern Pipeline*: because the bankruptcy court structure is unconstitutional, and because that structure can-

not be severed from the Act as a whole, the entire Act must fall—including its repealer provision (§ 401); thus, the hoary 1898 Act "revives." We submit that the syllogism's minor premise is simply wrong, for the reason that *Northern Pipeline* requires no such conclusion.

First, nowhere in the *Northern Pipeline* decision is there any reference or allusion to the possibility that the constitutional defect in the bankruptcy court system affects the repealer provision at all. Such an inference is contradicted by the Court's own acknowledgement that only the "procedural" aspects of the 1978 Reform Act are at issue. Throughout this Court's opinion, the focus of its constitutional analysis is exclusively on § 241(a) of the 1978 Act (adding 28 U.S.C. § 1471) and incidental related provisions. There is no suggestion that Congress' curative legislation will need to reenact the entire law.

Nor does the comprehensive nature of the 1978 Reform Act dictate that it must be nullified in its entirety if its bankruptcy court provisions are inoperable. That segments of the Act are susceptible to independent evaluation and operation is implicit in this Court's judgment in *United States* v. *Security Industrial Bank*, 51 U.S.L.W. 3420 (U.S. Nov. 30, 1982).[3] While Congress clearly believed that the bankruptcy court structure was a major innovation in the new Act, and was aware of the possibility of constitutional challenge to the court structure, the legislative history does not support a con-

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[3] The Court there held that, as a matter of statutory construction, § 522(f)(2) of the 1978 Reform Act did not invalidate security interests validly obtained before the enactment of that Act. We draw our inference from the Court's extended discussion of the possible Fifth Amendment challenge to § 522(f)(2), a discussion that would be largely superfluous unless that section—part of the substantive corpus of the 1978 Reform Act—operated independently of the bankruptcy courts provisions.

clusion that the entire Act should stand or fall on the strength of those provisions.[4]

Furthermore, the *Northern Pipeline* judgment in its entirety does not require that the whole Act stand or fall on the severability issue. Whatever implication may be drawn from the plurality's footnoted discussion (102 S.Ct. at 2880 n. 40) is counterbalanced by the clearly limited grounds for decision stated in the other opinions. Justices Rehnquist and O'Connor, concurring in the judgment, agree only that "this grant of authority [to entertain and decide state law claims] is not readily severable from the remaining grant of authority to Bankruptcy Courts under § 241(a). . . . ." 102 S.Ct. at 2882. The dissenting Justices explicitly state what they believe to be "the effective basis for today's decisions," 102 S.Ct. at 2883 n. 2, as follows:

> [N]on-Article III judges, regardless of whether they are labelled "adjuncts" to Article III courts or "Article I judges," may consider only controversies arising out of federal law. Because the immediate controversy in this case . . . arises out of state law, it may only be adjudicated, within the federal system, by an Article III court.

The lack of severability, in other words, was seen only in terms of the permissible and impermissible functions of the bankruptcy judges, and not in terms of vitiating the entire Act.

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[4] It is notable in this regard that the final form of the bankruptcy court structure was not settled until the very end of the legislative consideration, and was a last minute compromise meant to elevate the status of the bankruptcy judges without giving them Article III tenure. Thus, Congressional leaders referred to the bankruptcy courts as "adjuncts." See, Remarks of Cong. Butler, 124 Cong. Rec. H 11088 (daily ed. Sept. 28, 1978); Remarks of Sen. DeConcini, 124 Cong. Rec. S 17404 (daily ed. Oct. 6, 1978) This belies any inference that the specific court provisions finally adopted were the cornerstone of the entire Act.

B. The holding in *Northern Pipeline* permits the district courts to administer the substantive corpus of bankruptcy law under the 1978 Reform Act.

We submit that the 1978 Reform Act in fact is severable, as a matter of constitutional construction, even though the Court chose not to delineate those lines with great precision and referred the jurisdictional matter back to Congress.[5] We urge this Court to acknowledge that bankruptcy cases may still be administered, so long as matters requiring Article III courts are not decided by non-Article III judges.

For example, 28 U.S.C. § 1471 (a) & (b) (as added by § 241(a) of the 1978 Reform Act) initially vests jurisdiction over bankruptcy cases in the district courts. The same section then goes on to specify that this jurisdictional authority of the district courts shall be exercised by the "bankruptcy courts." 28 U.S.C. § 1471(c). Congress thus directed a delegation of authority from the district courts to the bankruptcy courts, and it is this sub-allocation of judicial power that is necessarily unconstitutional under the Court's analysis. As a matter of semantics, however, if § 1471(c) is removed, the residual jurisdiction of the district court remains. As a matter of constitutional requirement, there is no reason why, with the offending subsection stricken, the district courts could not continue to exercise their nominal authority under the Act. This would be no more constitutionally offensive than was the practice prior to 1978, when the district courts were in fact the "bankruptcy courts," using "ref-

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[5] We do not presume to advise the Court what it meant by its decision in *Northern Pipeline*. We believe the conclusions drawn here are fairly inferred from the Court's written opinions. If they are not, we ask the Court specifically to modify its *Northern Pipeline* holding in light of the unanticipated failure of Congress to act.

erees" (later "bankruptcy judges") for certain adjunct functions.[6]

Congress could apparently restore such a system, without constitutional invalidity. See *Northern Pipeline*, 102 S.Ct. at 2880 n. 40; Cf., *id* at 2882 (dissenting opinion of the Chief Justice). The district court's jurisdiction would encompass both the ministerial and "public law" matters arising directly from the bankruptcy laws, and through normal principles of pendent and ancillary jurisdiction could also include incidental or related matters of the type involved in *Northern Pipeline*. In such a system there would seem no constitutional obstacle if the district courts delegated or referred ministerial or "public law" matters to adjunct tribunals. Cf., Fed. R. Civ. P. 53.

If such legislation would be constitutionally permissible, and if the framework for just such a system remains in the 1978 Reform Act even after *Northern Pipeline*, we would urge this Court to recognize the authority of the district courts to proceed on that basis.

Certainly there is no inherent reason why the district court judges are incapable of performing the functions otherwise assigned by the 1978 Reform Act to the bankruptcy judges. The difficulty with having them do so is principally one of workload—it would burden the district judges with supervision over, and involvement in, many aspects of bankruptcy cases that were meant to be handled by the separate cadre of bankruptcy judges. These burdens, however, seem clearly preferable to a shut-down of the bankruptcy courts, and would offer a significant incentive to Congress to regularize a constitutional bankruptcy court structure.

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[6] Alternatively, sections 404 and 405 of the 1978 Reform Act expressly vest bankruptcy powers in the *district* courts as "courts of bankruptcy" *until April 1, 1984* (i.e., during the transition period). As courts of bankruptcy, and as Article III courts, the district courts are therefore still fully empowered to administer the Act. Cf., Memorandum from the Administrative Office of the United States Courts, December 3, 1982.

IV. UNTIL CONGRESS ENACTS CORRECTIVE LEGISLATION, THE DISTRICT COURTS SHOULD BE AUTHORIZED TO ADMINISTER THE BANKRUPTCY LAWS IN THE MANNER RECOMMENDED BY THE JUDICIAL CONFERENCE OF THE UNITED STATES.

Recognizing the authority of the district courts to administer the bankruptcy laws will prevent the complete shutdown of the bankruptcy system. But as a practical matter, that solution, alone, would mean that the district judges as a group would have to take on an additional load of half a million bankruptcy cases a year, while the more than 200 present "bankruptcy judges" would be constitutionally idled. The question then is whether, assuming the district courts have residual jurisdiction, portions of bankruptcy administration may be delegated by those courts to the "judges" of the bankruptcy courts.

As noted, under the prior Bankruptcy Act the district courts did delegate substantial bankruptcy authority to the "referees." Comparable delegations outside of bankruptcy have occurred through the widespread use of masters and magistrates. The line between delegable and non-delegable (Article III) powers of course must be observed, but with proper delineation a delegation of administrative powers to the bankruptcy courts is both pragmatically attractive and constitutionally sound.

The Judicial Conference of the United States has recommended an interim Rule for adoption and implementation by the district courts during the interval before Congress revises the 1978 Reform Act. The text of this interim Rule, and the accompanying memoranda from the Administrative Office are included in the Appendix to this brief. On information and belief, we understand that the substance of this Rule has been adopted in virtually all federal districts, including the Eastern District of Tennessee wherein this case arose. The Rule establishes a

system of referrals[7] by the district courts to the bankruptcy judges in order to "permit the bankruptcy system to continue without disruption." The Rule preserves to the district court full responsibility for matters requiring Article III judges, through a number of mechanisms: by permitting the district court to withdraw the reference (Rule § (c)(2)), by limiting the matters on which the bankruptcy judges may act (Rule § (d)(1)), by requiring district court review of certain matters (Rule § (d)(3)), and by permitting the bankruptcy judge to certify matters back to the district judge (Rule § (e)(3)).

The recommended interim Rule is obviously a "contingency approach" and falls measurably short of the streamlined system anticipated in the 1978 Reform Act. But we submit it assures a constitutional allocation of duties and, through application of the substantive corpus of the 1978 Reform Act, comes far closer to reflecting congressional desires than either suspension of all bankruptcy cases or the revival of the law of 1898.

Thus we urge the Court to rule that, pending congressional action, the district courts may proceed with bankruptcy administrations in the manner recommended by the Judicial Conference of the United States.

CONCLUSION

The nation, its people and its business, and its federal courts, face an extraordinary dilemma. This Court's decision in *Northern Pipeline*, coupled with the inability of Congress to legislate a restructuring of the bankruptcy court provisions of the 1978 Reform Act within the stay of mandate, threaten to close down or fundamentally disrupt the continued functioning of a national system of bankruptcy laws. Such results are neither consistent with

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[7] The Administrative Office of the United States Courts, in its Memorandum of December 3, 1982, finds that such delegation is authorized by § 105 of the 1978 Act and by Bankruptcy Rule 927.

congressional will nor compelled by the holding in *Northern Pipeline*. A constitutionally valid alternative exists, which is to affirm that the *Northern Pipeline* judgment permits exercise of bankruptcy powers by the district judges, and then to permit properly circumscribed delegation of certain of those powers to the existing bankruptcy judges.

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted and the case should be remanded with instructions to reinstate it on the docket with any proceedings to be governed (pending Congressional action) by court rules substantially similar to those recommended by the Judicial Conference of the United States.

Respectfully submitted,

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January 4, 1983

APPENDIX

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

Washington, D.C. 20544

September 27, 1982

WILLIAM E. FOLEY
Director

JOSEPH F. SPANIOL, JR.
Deputy Director

MEMORANDUM TO ALL:

Judges, United States Courts of Appeal
Judges, United States District Courts
Judges, United States Bankruptcy Courts
Clerks, United States Bankruptcy Courts

SUBJECT:

The Bankruptcy Court System after October 4, 1982 in Absence of Congressional Action.

The Supreme Court's recent decision in *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co., et al,* 102 S. Ct. 2858 (1982) held that the broad grant of jurisdiction to bankruptcy judges under the 1978 Act violates Article III of the Constitution. In applying its decision prospectively, the Court stayed its judgment until October 4, 1982 in order to afford the Congress an opportunity to reconstitute the bankruptcy courts or adopt some other valid means of adjudication, without impairing the interim administration of the bankruptcy laws.

During July and August, both the House and Senate held hearings on this important issue. Earlier this

month, the Executive Committee of the Judicial Conference provided the Congress with its views and offered draft legislation for revision of the current law in order to satisfy the Supreme Court's decision, with a minimum of disruption to the bankruptcy court structure. While it is hoped that the Congress will take affirmative action to remedy the constitutional defects in the bankruptcy law before the stay terminates on October 4, it is possible it may not have time to do so.

Therefore, the following is the view of the Administrative Office of the United States Courts of the status of the bankruptcy law during the transition period ending March 31, 1984 if the Congress fails to act by October 4 and no extension of the stay is granted.

In *Marathon*, the Court found that certain powers assigned to bankruptcy judges by the 1978 Bankruptcy Act could be constitutionally exercised only by an Article III judge. The Court refused to sever the unconstitutional excess and thus struck the Act's assignment of powers to bankruptcy judges in its entirety, effective October 5, 1982.

Marathon does not cause a jurisdictional lapse. The Administrative Office concludes that *Marathon* did not invalidate 11 U.S.C. sections 1471 (a), (b). In addition, sections 404 and 405 of the 1978 Act also vest bankruptcy powers in the district courts as "courts of bankruptcy" until 1984.

The attached rule is an interim measure by which district courts may delegate many of their bankruptcy powers to bankruptcy judges. The authority for this is found in section 105 of the 1978 Act (11 U.S.C. sec. 105), which gives courts of bankruptcy the power to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title," and in Bankruptcy Rule 927, which gives bankruptcy courts the power to adopt "rules governing practice and procedure under the Act." This delegation of power is

consistent with the long tradition of a bankruptcy court consisting of two judicial officers and the clear intent of the Congress to continue a two-officer court of bankruptcy through 1984.

Under the Rule, all bankruptcy matters are initially referred to a bankruptcy judge. [Section b(1) of the Rule.] In proceedings not involving a final judgment in a *Marathon* claim, the bankruptcy judge may enter orders and judgments that become effective immediately, subject to district court review if requested by a party. [Section (c)(2).] With respect to final judgments in *Marathon* claims, the bankruptcy judge prepares recommended findings and conclusions and a proposed judgment. [Section (c)(3).] A district judge then reviews the recommendation and enters a judgment. [Section (c)(5).] Where the bankruptcy judge certifies that circumstances require, an order or judgment entered by a bankruptcy judge will be confirmed by a district judge even if no objection is filed.

The district court will provide expedited review or confirmation of any order, judgment, or proposed judgment where the bankruptcy judge certifies prompt review is necessary.

/s/ William E. Foley
WILLIAM E. FOLEY

Attachment

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

Washington, D.C. 20544

December 3, 1982

WILLIAM E. FOLEY
Director

JOSEPH F. SPANIOL, JR.
Deputy Director

MEMORANDUM TO ALL:

Judges, U.S. Courts of Appeals
Judges, United States District Courts
Judges, United States Bankruptcy Courts
Clerks, U.S. District Courts
Clerks, U.S. Bankruptcy Courts

SUBJECT:

Continued Operation of the Bankruptcy Court System after December 24, 1982, in the Absence of Congressional Action

On September 27, 1982, I transmitted by memorandum a model rule and sample order in accordance with the following September 23, 1982 Resolution of the Judicial Conference:

RESOLVED:

That the Conference request the Director to provide each circuit with a proposed rule to take effect October 5, 1982 in the absence of congressional action or extension of the stay, which rule will permit the bankruptcy system to continue without disruption in reliance upon jurisdictional grants remaining in the law as limited by *Northern Pipeline Construction Co. v. Marathon Pipe Line Co. et al.*

My September 27, 1982 transmission was, of course, designed to provide a "contingency approach," as specified in the Conference's Resolution, "in the absence of Congressional action or extension of the stay," *then* scheduled to expire on October 4. As you know, the Supreme Court, on October 4 extended the stay until December 24, because Congress was not able to act before recessing on October 2.

Congress reconvened on November 29, five days ago. While efforts to take action are now being made by the Congress, I believe prudence requires that I again provide "a proposed rule . . . which . . . will permit the bankruptcy system to continue without disruption" should Congress be unable to act—or if the stay is not again extended—by December 24.

In *Northern Pipeline Construction Co. v. Marathon Pipe Line Co., et al.*, 102 S.Ct. 2858 (1982) the Supreme Court found that certain powers assigned to bankruptcy judges by the 1978 Bankruptcy Reform Act could be exercised constitutionally only by Article III judges, that language in the Act conferring unconstitutional authority could not be severed from language conferring other powers, and therefore provided the opportunity for Congress to correct the jurisdictional problem.

The Conference on September 10, 1982, advised Congress of its belief that the Supreme Court decision did not completely invalidate subsections (a) and (b) of section 1471 of Title 28, United States Code, as enacted in section 241(a) of the 1978 Act. In addition, sections 404 and 405 of that Act expressly vest bankruptcy powers in the *district* courts as "courts of bankruptcy" *until April 1, 1984*. The attached model rule has been formulated in reliance upon the remaining valid elements in the 1978 Act.

The attached model rule is intended to be an interim measure, by which district courts may delegate many of their bankruptcy powers to bankruptcy judges. The au-

thority for that delegation is found in section 105 of the 1978 Act, which gives courts of bankruptcy the power to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title," and in Bankruptcy Rule 927, which gives bankruptcy courts the power to adopt "rules governing practice and procedure under the Act."

Under the model rule, all bankruptcy matters are initially referred to a bankruptcy judge. [Section b(1) of the Rule.] In proceedings not involving a final judgment on a *Marathon* claim, the bankruptcy judge may enter orders and judgments that become effective immediately, subject to district court review if requested by a party. [Section (c)(2).] With respect to final judgments in *Marathon* claims, the bankruptcy judge prepares recommended findings and conclusions and a proposed judgment. [Section (c)(3).] A district judge then reviews the recommendation and enters a judgment. [Section (c)(5).] Where the bankruptcy judge certifies that circumstances require, an order or judgment entered by a bankruptcy judge will be confirmed by a district judge even if no objection is filed.

The district court will provide expedited review or confirmation of any order, judgment, or proposed judgment where the bankruptcy judge certifies prompt review is necessary.

/s/ William E. Foley
WILLIAM E. FOLEY

Attachments: Model Rule
Sample Order

RULE

(a) Emergency Resolution

The purpose of this rule is to supplement existing law and rules in respect to the authority of the bankruptcy judges of this district to act in bankruptcy cases and proceedings until Congress enacts appropriate remedial legislation in response to the Supreme Court's decision in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, —— U.S. ——, 102 S.Ct. 2858 (1982), or until March 31, 1984, whichever first occurs.

The judges of the district court find that exceptional circumstances exist. These circumstances include: (1) the unanticipated unconstitutionality of the grant of power to bankruptcy judges in section 241(a) of Public Law 95-598; (2) the clear intent of Congress to refer bankruptcy matters to bankruptcy judges; (3) the specialized expertise necessary to the determination of bankruptcy matters; and (4) the administrative difficulty of the district courts' assuming the existing bankruptcy caseload on short notice.

Therefore, the orderly conduct of the business of the court requires this referral of bankruptcy cases to the bankruptcy judges.

(b) Filing of bankruptcy papers

The court of bankruptcy constituted by § 404 of Public Law 95-598 shall continue to be known as the United States Bankruptcy Court of this district. The Clerk of the Bankruptcy Court is hereby designated to maintain all files in bankruptcy cases and adversary proceedings. All papers in cases or proceedings arising under or related to Title 11 shall be filed with the Clerk of the Bankruptcy Court regardless of whether the case or proceeding is before a bankruptcy judge or a judge of the district court, except that a judgment by the district judge shall

be filed in accordance with Rule 921 of the Bankruptcy Rules.

(c) Reference to Bankruptcy Judges

(1) All cases under Title 11 and all civil proceedings arising under Title 11 or arising in or related to cases under Title 11 are referred to the bankruptcy judges of this district.

(2) The reference to a bankruptcy judge may be withdrawn by the district court at any time on its own motion or on timely motion by a party. A motion for withdrawal of reference shall not stay any bankruptcy matter pending before a bankruptcy judge unless a specific stay is issued by the district court. If a reference is withdrawn, the district court may retain the entire matter, may refer part of the matter back to the bankruptcy judge, or may refer the entire matter back to the bankruptcy judge with instructions specifying the powers and functions that the bankruptcy judge may exercise. Any matter in which the reference is withdrawn shall be reassigned to a district judge in accordance with the court's usual system for assigning civil cases.

(3) Referred cases and proceedings may be transferred in whole or in part between bankruptcy judges within the district without approval of a district judge.

(d) Powers of Bankruptcy Judges

(1) The bankruptcy judges may perform in referred bankruptcy cases and proceedings all acts and duties necessary for the handling of those cases and proceedings except that the bankruptcy judges may not conduct:

(A) a proceeding to enjoin a court;

(B) a proceeding to punish a criminal contempt—

(i) not committed in the bankruptcy judge's actual presence; or

(ii) warranting a punishment of imprisonment;

(C) an appeal from a judgment, order, decree, or decision of a United States bankruptcy judge; or

(D) jury trials.

Those matters which may not be performed by a bankruptcy judge shall be transferred to a district judge.

(2) Except as provided in (d)(3), orders and judgments of bankruptcy judges shall be effective upon entry by the Clerk of the Bankruptcy Court, unless stayed by the bankruptcy judge or a district judge.

(3)(A) Related proceedings are those civil proceedings that, in the absence of a petition in bankruptcy, could have been brought in a district court or a state court. Related proceedings include, but are not limited to, claims brought by the estate against parties who have not filed claims against the estate. Related proceedings do not include: contested and uncontested matters concerning the administration of the estate; allowance of and objection to claims against the estate; counterclaims by the estate in whatever amount against persons filing claims against the estate; orders in respect to obtaining credit; orders to turn over property of the estate; proceedings to set aside preferences and fraudulent conveyances; proceedings in respect to lifting of the automatic stay; proceedings to determine dischargeability of particular debts; proceedings to object to the discharge; proceedings in respect to the confirmation of plans; orders approving the sale of property where not arising from proceedings resulting from claims brought by the estate against parties who have not filed claims against the estate; and similar matters. A proceeding is not a related proceeding merely because the outcome will be affected by state law.

(B) In related proceedings the bankruptcy judge may not enter a judgment or dispositive order, but shall sub-

mit findings, conclusions, and a proposed judgment or order to the district judge, unless the parties to the proceeding consent to entry of the judgment or order by the bankruptcy judge.

(e) District Court Review

(1) A notice of appeal from a final order or judgment or proposed order or judgment of a bankruptcy judge or an application for leave to appeal an interlocutory order of a bankruptcy judge, shall be filed within 10 days of the date of entry of the judgment or order or of the lodgment of the proposed judgment or order. As modified by sections (e) 2A and B of of this rule, the procedures set forth in Part VIII of the Bankruptcy Rules apply to appeals of bankruptcy judges' judgments and orders and the procedures set forth in Bankruptcy Interim Rule 8004 apply to applications for leave to appeal interlocutory orders of bankruptcy judges. Modification by the district judge or the bankruptcy judge of time for appeal is governed by Rule 802 of the Bankruptcy Rules.

(2) (A) A district judge shall review:

(i) an order or judgment entered under paragraph (d) (2) if a timely notice of appeal has been filed or if a timely application for leave to appeal has been granted;

(ii) an order or judgment entered under paragraph (d) (2) if the bankruptcy judge certifies that circumstances require that the order or judgment be approved by a district judge, whether or not the matter was controverted before the bankruptcy judge or any notice of appeal or application for leave to appeal was filed; and

(iii) a proposed order or judgment lodged under paragraph (d)(3), whether or not any notice of appeal or application for leave to appeal has been filed.

(B) In conducting review, the district judge may hold a hearing and may receive such evidence as appropriate and may accept, reject, or modify, in whole or in part, the order or judgment of the bankruptcy judge, and need give no deference to the findings of the bankruptcy judge. At the conclusion of the review, the district judge shall enter an appropriate order or judgment.

(3) When the bankruptcy judge certifies that circumstances require immediate review by a district judge of any matter subject to review under paragraph (d)(2), the district judge shall review the matter and enter an order or judgment as soon as possible.

(4) It shall be the burden of the parties to raise the issue of whether any proceeding is a related proceeding prior to the time of the entry of the order or judgment of the district judge after review.

(f) Local Rules

In proceedings before a bankruptcy judge, the local rules of the bankruptcy court shall apply. In proceedings before a judge of the district court, the local rules of the district court shall apply.

(g) Bankruptcy Rules and Title IV of Public Law 95-598

Courts of bankruptcy and procedure in bankruptcy shall continue to be governed by Title IV of Public Law 95-598 as amended and by the bankruptcy rules prescribed by the Supreme Court of the United States pursuant to 28 U.S.C. § 2075 and limited by SEC. 405(d) of the Act, to the extent that such Title and Rules are not

inconsistent with the holding of Northern Pipeline Construction Co. v. Marathon Pipe Line Co., —— U.S. ——, 102 S.Ct. 2858 (1982).

(h) Effective Date and Pending Cases

This rule shall become effective December 25, 1982, and shall apply to all bankruptcy cases and proceedings not governed by the Bankruptcy Act of 1898 as amended, and filed on or after October 1, 1979. Any bankruptcy matters pending before a bankruptcy judge on December 25, 1982 shall be deemed referred to that judge.

Sample Order

Acting pursuant to the authority vested in the Judicial Council by 28 U.S.C. § 332(d), the Judicial Council of the ———— circuit concludes that the uniform effective and expeditious administration of justice within this circuit requires that the attached rule for the administration of the bankruptcy system in this circuit be adopted by the district courts of this circuit pursuant to 11 U.S.C. § 105, and it is so ordered.

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

Washington, D.C. 20544

December 22, 1982

WILLIAM E. FOLEY
Director

JOSEPH F. SPANIOL, JR.
Deputy Director

MEMORANDUM TO ALL:

Judges, United States Court of Appeals
Judges, United States District Courts
Judges, United States Bankruptcy Courts
Clerks, United States District Courts
Clerks, United States Bankruptcy Courts

SUBJECT:

Clarification of Proposed Interim Bankruptcy Rule Transmitted by Memorandum of December 3, 1982

Since issuance of a proposed interim bankruptcy rule on December 3, 1982, I have received a number of inquiries in respect to the difference between the rule transmitted on September 27, 1982 and the later rule. This memorandum is to advise you that the proposed bankruptcy rule transmitted on December 3 supercedes and should be substituted for the rule which was transmitted on September 27, 1982. The rule transmitted on December 3 differs from the previous one in the following essential respects:

1. The rule redefines and addresses in greater detail the types of proceedings in which a bankruptcy judge may or may not issue a final order or judgment. Paragraph (d) (3) (A), (B).

2. The rule places a time limit upon the right of parties to raise the issue of whether any proceeding is a related proceeding as defined in the rule. Paragraph (e)(4).

3. The rule provides for the continued application of local district court rules and local bankruptcy court rules. Paragraph (f).

4. The rule makes clear that the legal and administrative structure established by the Bankruptcy Rules and Title IV of Public Law 95-598 continues in full force and effect. Paragraph (g). See also paragraph(b) in respect to filing of district court judgments and paragraph (e) in respect to procedure for district court review.

5. The new rule specifically recognizes the continued existence of the Clerk of bankruptcy court as a separate office pursuant to Sec. 404(e) of Public Law 95-598. Paragraph (a).

The following typographical corrections should be made in the December 3 rule before it is adopted locally:

1. In the first line of paragraph (b), "bankruptcy court" should read "court of bankruptcy."

2. In the third line of paragraph (e)(3), "paragraph (d)(2) should read "paragraph (e)(2)."

3. In the third line of paragraph (e)(4), "order of judgment" should read "order or judgment."

William E. Foley